AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~253~~ 52

JOHN SPARHAWK, GEORGE J. GROSS, AND J. DAVIS DUFFIELD, ASSIGNEES IN BANKRUPTCY OF CHARLES T. YERKES, JUNIOR, A BANKRUPT, APPELLANTS,

vs.

SHREVE ACKLEY, BUSHROD W. ADAMS, F. C. ARNOLD, J. BELL AUSTIN, HERMAN F. BACHMAN, MEREDITH BAILEY, ET AL., MEMBERS OF THE PHILADELPHIA BOARD OF BROKERS, AND CHARLES T. YERKES, JUNIOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED JUNE 4, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 372.

JOHN SPARHAWK, GEORGE J. GROSS, AND J. DAVIS DUFFIELD, ASSIGNEES IN BANKRUPTCY OF CHARLES T. YERKES, JUNIOR, A BANKRUPT, APPELLANTS,

vs.

SHREVE ACKLEY, BUSHROD W. ADAMS, F. C. ARNOLD, J. BELL AUSTIN, HERMAN F. BACHMAN, MEREDITH BAILEY, ET AL., MEMBERS OF THE PHILADELPHIA BOARD OF BROKERS, AND CHARLES T. YERKES, JUNIOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	6	2
Answer of Charles T. Yerkes, Jr.	15	8
Replication	20	11
Answer of Shreve Ackley *et al.*, &c.	21	11
Agreement to make Chasrles E. Yerkes party defendant	26	13
Order appointing examiner and master	27	13
Master's report	28	13
Testimony on petition of assignees for sale of member-ship in stock exchanges. (Omitted in printing)	33	—
Testimony of Charles T. Yerkes. (Omitted in printing)	33	—
John Sparhawk. " "	40	—
J. Davis Duffield. " "	47	—
Exhibit A, J. M., Rg.—Constitution of stock exchange. (Omitted in printing)	54	—
Testimony of John G. Johnson. (Omitted in printing)	58	—
Exhibit A—Statement of dividends, &c. (Omitted in printing)	60	—

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1891.

	Original.	Print
Petition of assignees for review of order of United States district judge, &c. (Omitted in printing)	63	—
Answer of Chas. T. Yerkes, Jr., to petition. (Omitted in printing)	66	—
Report of register.	70	—
Assignees' exceptions to report of register.	82	—
Register's report on exceptions.	84	—
Opinión on petition.	87	—
Evidence before master.	89	—
Testimony of John Sparhawk.	90	—
J. Davis Duffield.	94	—
John Sparhawk (recalled).	100	—
Exceptions to master's report.	105	—
Submission.	107	—
Opinion	108	14
Final decree	111	15
Order allowing appeal	113	15
Citation	115	16
Acceptance of service of citation	118	17
Appeal bond	119	17
Clerk's certificate	125	19
Agreement for omission of part of record in printing	126	20

1 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

JOHN SPARHAWK, GEORGE J. GROSS, and J. DAVIS DUFFIELD, Assignees in Bankruptcy of Charles T. Yerkes, Jr., a Bankrupt,

vs.

SHREVE ACKLEY, BUSHROD W. ADAMS, F. C. ARNOLD, *et al.*, Members of the Philadelphia Board of Brokers, and Charles T. Yerkes, Jr., the said Bankrupt.

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania*, } *ss.*:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October sessions, 1885, No. 32.

It is thus contained:

2 Be it remembered that on the nineteenth day of November, in the year of our Lord one thousand eight hundred and eighty-five, John Sparhawk, George J. Gross, and J. Davis Duffield, assignees in bankruptcy of Charles T. Yerkes, Jr., a bankrupt, by their attorney, George Junkin, Esquire, comes into court here and files their bill of complaint against Shreve Ackley, Bushrod W. Adams, F. C. Arnold, J. Bell Austin, Herman F. Bachman, Meredith Bailey, Frederick Bain, Abraham Barker, W. Barker, Chas. D. Barney, C. M. Bayard, W. M. Bayard, John P. Bell, Henry Bentley, Lloyd W. Bickley, H. W. Biddle, T. A. Biddle, A. Biddle, J. T. Bingham, Chas. H. Bieron, John Bieron, Wm. M. Blakeslee, Henry Borden, Chas. L. Borie, H. W. Boureau, Ezra Bowen, N. Brice, P. H. Brice, R. B. Brinton, Jr., C. Camblos, Jr., G. W. Camblos, Wm. P. Camblos, Wm. Y. Carver, J. G. Cassatt, W. S. Carrigan, S. W. Colton, Jr., J. Milton Colton, J. Hicks Conrad, Harry

3 Connelly, J. Cooke, Jr., Robert B. Davidson, John H. Davis, Jas. S. Davidson, A. H. De Haven, H. De Haven, F. M. Dick, J. H. Dingee, Jr., Jos. D'Invilliers, A. J. Drexel, Francis H. Duffee, John W. Dulles, Robert M. Dunn, Wm. Edge, S. M. Elliot, Wm. Elliot, Rudolph Elliot, Wm. H. Ely, H. L. Fell, A. D. Fell, Walter P. Fell, W. R. Fisher, C. M. Fleming, G. S. Fox, Caleb F. Fox, D. B. Fox, J. M. Fox, David A. Freed, C. F. Frothingham, H. L. Gaw, H. L. Gaw, Jr., Wm. Gerlach, Geo. Gilpin, R. Glendinning, Jr., Edw. Gove, Theo. R. Graham, Edgar C. Gramm, J. Ralston Grant, Jas. M. Greggs, Lindley Haines, C. E. Haines, W. P. Hallowell, Oswald T. Hanna, J. C. Harris, G. Heberton, W. Y. Heberton, Craig Heberton, E. Henderson, G. M. Hickling, R. F. Hickling, G. W. Hobson, Jas. Hopkins, Wm. G. Hopper, G. R. Horner, Jno. G. Howard, Wm. G. Huey, Geo. A. Huhn, J. N. Hutchinson, Francis Huth, R. M. Janney, B. K. Jamison, John C. Johnson, I. C. Jones, Jr., J. H.

4 Jones, R. D. Jones, Chas. H. Jordan, C. B. Keen, E. W. Keene, D. Kennedy, W. T. Kingsley, Louis S. Kite, T. C. Knight, R.

J. W. Koons, W. W. Kurtz, Thos. L. Lawson, W. L. Lawson, H. H. Lee, H. A. Lentz, S. L. Levy, E. C. Lewis, H. W. Lippincott, C. E. Lloyd, J. Lloyd, Wm. H. Lloyd, Jno. B. Love, Kirk W. Magill, E. V. Maitland, J. J. Maitland, Jno. A. Maitland, W. W. Maris, H. Markoe, J. Markoe, R. T. Martin, Dion M. Martinez, E. W. Matthews, C. L. Matthews, Geo. Meade, C. A. McManus, Wm. J. McLaughlin, Robert Moffly, Gordon Monges, R. H. Moon, E. J. Moore, W. C. Morgan, Jr., Wm. J. Morris, John R. Moss, T. C. Musgrove, Harry F. Newhall, C. H. Needles, Jr., Chas. Newkirch, C. B. Newbold, L. H. Niles, G. H. North, W. F. North, Chas. H. Oberge, Edw. D. Page, Geo. W. Palmer, E. B. Paul, M. B. Paxson, Frederick Paxson, Harry Peale, W. J. Peale, C. L. Peterson, Chas. G. Phillips, Wm. C. Pierce, H. C. Potter, Geo. C. Potts, R. F. Raley,
5 John C. Ritchie, Edw. Robins, E. J. Robinson, John Sailer, Lewis Seal, Jos. H. Seaver, Jos. H. Shelmerdine, E. H. Stevens, D. C. W. Smith, F. Percy Smith, Winthrop Smith, J. Rundle Smith, Frank Smyth, Edw. Starr, Benj. Sterling, Geo. Stevenson, Wm. H. Stevenson, H. H. St. John, Chas. M. Stokes, Jos. H. Straub, Edwin Swift, Wm. Sinnett, Clarence Taylor, J. R. Taylor, L. H. Taylor, Jr., John M. Taylor, Joshua Tevis, Wm. H. Tevis, Geo. C. Thomas, S. H. Thomas, David S. Thompson, Augustus Thouron, C. M. Town, H. L. Townsend, R. H. Townsend, Jr., Eugene Townsend, Jos. Trotter, J. G. Watmough, R. H. Watson, Chas. F. Webb, L. L. Webster, J. N. Whelen, W. N. Whelen, H. H. Wiltbank, J. K. Wildman, Henry W. Wise, J. K. Worthington, Chas. B. Wright, Chas. E. Yerkes, and T. S. Young, members of the Philadelphia Board of Brokers, and Charles T. Yerkes, Jr., the said bankrupt; which, being read, is in the words and figures following, to wit:

6 In the Circuit Court of the United States for the Eastern District of Pennsylvania. In Equity.

JOHN SPARHAWK, GEORGE J. GROSS, and J. DAVIS DUFFIELD, Assignees in Bankruptcy of Charles T. Yerkes, Jr., a Bankrupt, Complainants,

and

SHREVE ACKLEY, BUSHROD W. ADAMS, F. C. ARNOLD, J. BELL Austin, Herman F. Baehman, Meredith Bailey, Frederick Bain, Abraham Barker, W. Barker, Chas. D. Barney, C. M. Bayard, W. M. Bayard, John P. Bell, Henry Bentley, Lloyd W. Bickley, H. W. Biddle, T. A. Biddle, A. Biddle, J. T. Bingham, Chas. H. Bieron, John Bieron, Wm. M. Blakeslee, Henry Borden, Chas. L. Borie, H. W. Boureau, Ezra Bowen, N. Brice, P. H. Brice, R. B. Brinton, Jr., C. Camblos, Jr., G. W. Camblos, Wm. P. Camblos, Wm. Y. Carver, J. G. Cassatt, W. S. Carrigan, S. W. Colton, Jr., J. Milton Colton, J. Hicks Conrad, Harry Connelly, J. Cooke, Jr., Robert B. Davidson, John H. Davis, Jas. S. Davidson, A. H. De Haven, H. De Haven, F. M. Dick, J. H. Dingee, Jr., Jos. D'Invilliers, A. J. Drexel, Francis H. Duffee, John W. Dulles, Robert M. Dunn, Wm. Edge, S. M. Elliot, Wm. Elliot, Rudolph Elliot, Wm.

H. Ely, H. L. Fell, A. D. Fell, Walter P. Fell, W. R. Fisher, C. M. Fleming, G. S. Fox, Caleb F. Fox, D. B. Fox, J. M. Fox, David A. Freed, C. F. Frothingham, H. L. Gaw, H. L. Gaw, Jr., Wm. Gerlach, Geo. Gilpin, R. Glendinning, Jr., Edw. Gove, Theo. R. Graham, Edgar C. Gramm, J. Ralston Grant, Jas. M. Greggs, Lindley Haines, C. E. Haines, W. P. Hallowell, Oswald T. Hanna, J. C. Harris, G. Heberton, W. Y. Heberton, Craig Heberton, E. Henderson, G. M. Hickling, R. F. Hickling, G. W. Hobson, Jas. Hopkins, Wm. G. Hopper, G. R. Horner, Jno. G. Howard, Wm. G. Huey, Geo. A. Huhn, J. N. Hutchinson, Francis Huth,
7 R. M. Janney, B. K. Jamison, John C. Johnson, I. C. Jones, Jr., J. H. Jones, R. D. Jones, Chas. H. Jordan, C. B. Keen, E. W. Keene, D. Kennedy, W. T. Kingsley, Louis S. Kite, T. C. Knight, R. J. W. Koons, W. W. Kurtz, Thos. L. Lawson, W. L. Lawson, H. H. Lee, H. A. Lentz, S. L. Levy, E. C. Lewis, H. W. Lippincott, C. E. Lloyd, J. Lloyd, Wm. H. Lloyd, Jno. B. Love, Kirk W. Magill, E. V. Maitland, J. J. Maitland, Jno. A. Maitland, W. W. Maris, H. Markoe, J. Markoe, R. T. Martin, Dion M. Martinez, E. W. Matthews, C. L. Matthews, Geo. Meade, C. A. McManus, Wm. J. McLaughlin, Robert Moffly, Gordon Monges, R. H. Moon, E. J. Moore, W. C. Morgan, Jr., Wm. J. Morris, John R. Moss, T. C. Musgrove, Harry F. Newhall, C. H. Needles, Jr., Chas. Newkirch, C. B. Newbold, L. H. Niles, G. H. North, W. F. North, Chas. H. Oberge, Edw. D. Page, Geo. W. Palmer, E. B. Paul, M. B. Paxson, Frederick Paxson, Harry Peale, W. J. Peale, C. L. Peterson, Chas. G. Phillips, Wm. C. Pierce, H. C. Potter, Geo. C. Potts, R. F. Raley, John C. Ritchie, Edw. Robins, E. J. Robinson, John Sailer, Lewis Seal, Jos. H. Seaver, Jos. H. Shelmerdine, E. H. Stevens, D. C. W. Smith, F. Percy Smith, Winthrop Smith, J. Rundle Smith, Frank Smyth, Edw. Starr, Benj. Sterling, Geo. Stevenson, Wm. H. Stevenson, H. H. St. John, Chas. M. Stokes, Jos. H. Straub, Edwin Swift, Wm. Sinnett, Clarence Taylor, J. R. Taylor, L. H. Taylor, Jr., John M. Taylor, Joshua Tevis, Wm. H. Tevis, Geo. C. Thomas, S. H. Thomas, David S. Thompson, Augustus Thouron, C. M. Town, H. L. Townsend, R. H. Townsend, Jr., Eugene Townsend, Jos. Trotter, J. G. Watmough, R. H. Watson, Chas. F. Webb, L. L. Webster, J. N. Whelen, W. N. Whelen, H. H. Wiltbank, J. K. Wildman, Henry W. Wise, J. K. Worthington, Chas. B. Wright, Chas. E. Yerkes, and T. S. Young, Members of the Philadelphia Board of Brokers, and Charles T. Yerkes, Jr., the said Bankrupt, Respondents.

To the honorable the judges of the said court:

The said complainants bring this their bill of complaint against the above-named respondents, and show unto your honors—

I. That on the 13th day of December, 1871, Charles T. Yerkes, Jr., trading as Charles T. Yerkes, Jr., & Co., was duly adjudicated
8 a bankrupt in the district court of the United States for the eastern district of Pennsylvania by the Honorable John Cadwallader, who was then the judge of the said court, and on the 12th day of January, 1872, your orators were duly appointed

the assignees of the said bankrupt, and qualified according to law, and on the 24th day of January, 1872, all of the said bankrupt's estate of every description was assigned, according to law, to, and the same is now vested in, your orators, except what has been sold and divided among the creditors of the said bankrupt.

II. That at the time said Charles T. Yerkes, Jr., was so adjudicated a bankrupt and his assets and property and rights of property of every description were so vested in your orators he was a member of an association located in and doing business in the city of Philadelphia and known as "The Philadelphia Stock Exchange" or "The Philadelphia Board of Brokers." In his schedule of his personal estate filed in said court of bankruptcy the said bankrupt described this asset in these words: "Membership in board of brokers, Philadelphia, of no specified value." This board of brokers is an unincorporated association organized for the purpose of facilitating the dealings in stocks, bonds, and other securities by brokers in this city, having a president, vice-president, and secretary. Membership therein is acquired and held subject to various regulations prescribed by its constitution and by-laws, fees and annual charges being payable by its members, and these memberships have become to be regarded as very valuable, as they may be transferred by the member, subject to the approval of certain committees and provided there is no indebtedness of the member to the association or its members. Upon insolvency of a member his privileges are suspended, subject to his reinstatement upon the settlement of the debts to the association or any of its members. In case of the failure to make such settlements provision exists for a sale of the insolvent membership and distribution of its proceeds among his creditor members, it being thus a fundamental principle of the association that the pecuniary value of the rights and privileges of membership shall be mutually pledged by all the members for the fulfilment of their contracts with each other and the association, and any surplus after paying or settling these would go to the insolvent member.

This association has existed in this city for many years and continuously since 1871, and still exists, and the persons whose
9 names are recited in the caption of the bill are the present members of the association, so far as they are known to your orators, and the officers of said association at the present time are Bushrod W. Adams, president; H. F. Bachman, vice-president; John C. Johnson, secretary.

III. At the time of his insolvency and bankruptcy Charles T. Yerkes, Jr., was indebted to fifteen members of this association in sums aggregating about $21,842.11, and was not indebted to the association. Notice was given to the officers of the association by your orators immediately after they qualified as assignees of their appointment, and your orators gave public notice of the same by the usual advertisements in the newspapers, and they subsequently gave formal written notice to the officers of the said association that they claimed to own the said membership, and asked for the form of transfer and sale thereof.

IV. The subject of the right to this membership and the property

therein was a matter of discussion between the said Charles T. Yerkes, Jr., and your orators, he claiming that his rights to said membership were purely personal to himself, and that the same did not pass to or vest in your orators, whilst they uniformly claimed in these discussions that they were property and assets which did pass to and vest in them.

At the time of the bankruptcy, and even up to the present time, the market value of the said membership would not have been equal to the amount due by the said bankrupt to his fellow-members, and therefore would not have yielded anything to the bankrupt estate.

In interviews with your orators the matter of the payment of the annual dues upon the membership was spoken of, and one of your orators said to the said Charles T. Yerkes, Jr., that as the board had made the claim upon him for these dues he had better pay them, and any claims of that character which he might pay your orators would recognize as properly to be refunded to him out of anything which they might hereafter realize from the seats in the board.

There were repeated interviews between your orators and the said Charles T. Yerkes, Jr., upon this subject, in which your orators maintained their right to the membership, subject to his right to reimbursement for current expenses which they might have been required themselves to pay in order to keep their title to the same, and he maintaining that your orators had no rights thereto.

V. The membership in the said association was not forfeited or sold. The fifteen members of the said association who were creditors of Charles T. Yerkes, Jr., proved their debts in bankruptcy against him and received their dividends thereon, amounting to twenty-eight per cent.

These dividends were declared at the following times and were so paid shortly after said dates, viz:

Ten (10) per cent. on July 19th, 1872.
Nine (9) per cent. on May 12th, 1873.
Eight (8) per cent. on April 5th, 1878.
One (1) per cent. on January 30th, 1880.

These creditors made no mention in their proof of claims of the lien they had upon the membership in said association, and they were awarded and received the full amount of their said dividends without objection from any one, and said proofs of claims are unassigned.

VI. The said Charles T. Yerkes, Jr., received his final discharge as a bankrupt on October 3, 1873; and your orators are informed that in some way and by some means he procured the withdrawal of the suspension of his membership and he was reinstated in his membership somewhere about 1882 or 1883, of which reinstatement and withdrawal of suspension your orators were wholly unaware and had no notice or information of until immediately before the filing of the petition mentioned in the next paragraph of this their bill of complaint. During the interval from 1871 to this time his membership was merely suspended, he paying the annual charges after

his interview upon the subject with your orators, as hereinbefore set forth.

Your orators cannot state the particulars of the terms upon which he obtained from these creditors such a settlement as secured his reinstatement in the said board of brokers, as they were not parties to it nor were they consulted by him or any one in reference thereto, but they have been informed by him that they were to have the right to get all dividends that might hereafter be paid by your orators as such assignees.

11 VII. The market value of said membership has greatly appreciated and is now worth from $5,000 to $8,000. Your orators, believing it to be their duty to endeavor to realize from the sale of the said membership whatever was possible, and also that if they offered it at public sale the said Charles T. Yerkes, Jr., would take such action as would prevent such sale producing the full value of the membership, applied to the Hon. William Butler, judge of the said district court, on the 28th day of April, 1884, by petition, praying that the rights of the said Charles T. Yerkes, Jr., and of your orators to the said membership might be determined, and that an order might be made for the sale of the same, and that he be enjoined from interfering with the said sale, and for such further order and decree as the exigencies of the case might require. A citation was granted by the said judge, served upon Charles T. Yerkes, Jr., who appeared and filed his answer thereto, and the matter was referred to Joseph Mason, Esq., register in bankruptcy, who took testimony and made a report recommending that the petition should be dismissed.

Upon argument upon the exceptions to this report the said learned judge dismissed the said exceptions, refused the order prayed for in the said petition, and dismissed the said petition on the 26th day of June, 1885; and afterwards, on the 8th day of October, 1885, the circuit court of the United States for the eastern district of Pennsylvania, upon a petition for a review of the said order of the said district judge, affirmed the said order and dismissed the said petition for review.

VIII. That your orators are informed and believe that the action of the said learned judge and court recited in the last paragraph was based mainly upon the suggestion that there was no warrant in the law for the granting of such a summary order as was prayed for and because the said board of brokers had rights involved in the subject-matter of said petition which could not properly be determined without their having their day in court and being brought in before any decree should be made in the premises.

IX. Your orators show to your honors that the membership of Charles T. Yerkes, Jr., in the said association was a species of property which passed to them as the assignees of the said bankrupt, and that they have never abandoned their claim to the same; that in order that its real value may be obtained by a sale thereof

12 for the benefit of the bankrupt estate it is necessary that the rights of the said association, and of the said Charles T. Yerkes, Jr., as well as those of your orators, under the facts and cir-

cumstances hereinbefore stated should be judicially ascertained, and that the same should be sold under the order of this court in such way as to realize the real market value thereof, or that the said Charles T. Yerkes, Jr., should account to your orators for the market value of the said membership or at least pay to your orators such sums of money as they have paid to the said members of said association as dividends upon their said debts, which were liens upon his said membership, in case it should be held by your honors that the said Charles T. Yerkes, Jr., was entitled to retain said membership as against your orators; that your orators believe that unless this course is pursued, if your orators should expose the same to public or private sale, the said Charles T. Yerkes, Jr., and the said association would interpose such notices and objections as would effectually frustrate said sale and prevent the obtaining the real market value thereof.

Wherefore your orators need and pray for the following equitable relief:

1st. That the rights of your orators, of the said Charles T. Yerkes, Jr., and of the said association in and to the said membership may be ascertained and determined by your honors.

2d. That it may be decreed that the said membership in the said association was an asset of the said bankrupt's estate, which passed to and is now vested in your orators as his assignees.

3d. That a sale of the said membership may be decreed by your honors and the said Charles T. Yerkes, Jr., and the said association and all of its members may be restrained by the order or injunction of your honors from interfering with the sale of the same and be decreed to admit the vendee of your orators to full membership in the said board or association in the place of the said Charles T. Yerkes, Jr.

4th. That the proceeds of the said sale, when so made, may be paid to your orators for distribution among the creditors of the said bankrupt.

5th. That if it shall be determined by your honors that the said Charles T. Yerkes, Jr., is entitled to be reimbursed for any moneys paid by him for or on account of the said membership that it may be ordered that such reimbursement shall be made out of the proceeds of the said sale.

13 6th. Or, if it should be determined by the court that the said Charles T. Yerkes, Jr., had the right to retain the said membership in the said association as against your orators, that he be ordered to account for the market value of the same and to pay to your orators such amounts as they have paid as dividends upon the debts due by him to his fellow-members of the said association at the time of his said insolvency and bankruptcy, and which debts were a lien upon said membership, together with interest thereon.

7th. That discovery may be made by the respondents as to the names and residences of all the other members of the said association.

8th. That your orators may have such other and further relief as

so your honors may seem meet and the justice of the case may be duly & duly administered.

May that a subpoena in equity be granted requiring the said respondents to appear and answer this bill of complaint.

GEO. GRANT DAVIS.
Solicitor for Complainants.

14 Endorsed: No. 92 October sessions, 1865. U. S. C. C. John Sparhawk et al. vs. Charles T. Yerkes Jr. a bankrupt, complainants and Charles T. Yerkes Jr. a bankrupt, and The Philadelphia Board of Brokers respondents. In equity. Bill of complaint. Please issue subpoena in equity, table fee, &c. Yours &c. Geo. Grant Davis, Sol. for complts. Nov 16, 1865. U. S. C. C. Pa. George Junkin, solicitor for complainants. Filed Nov 16, 1865.

15 And afterwards, to wit on the 5th day of April, A. D. 1866, the said Charles T. Yerkes Jr. by his attorney Frank P. Prichett Esq. comes into court here and files his answer in the words and figures following:

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

No. 92 Of October Session, 1865.

In Equity.

John Sparhawk, George J. Grant, and J. Davis Deperiam, Assignees in Bankruptcy of Charles T. Yerkes, Jr., a Bankrupt, Complainants.

and

Simeon Ackley and Others, Members of the Philadelphia Board of Brokers, and Charles T. Yerkes, Jr., the said Bankrupt, Respondents.

To the honorable the judges of the said court:

The separate answer of Charles T. Yerkes, Jr., to the above bill of complaint respectfully showeth:

I. I admit the truth of the statements contained in the first paragraph of said bill.

II. I admit the truth of the statements contained in the second paragraph of said bill, except so far as it might be inferred therefrom that an insolvent member of the Philadelphia Board of Brokers has a right to be reinstated upon the settlement of his indebtedness. His reinstatement is a matter of grace and not of right, which fact will appear by the constitution and by-laws of the association referred to in said bill, and I pray that complainants may be required to make due proof of said constitution and by-laws.

16 III. I admit that at the time of my bankruptcy I was indebted to fifteen members of the said association in sums aggregating about $21,324.11, and was not indebted to the association.

I have no knowledge of any notices given by complainants to the association, but am informed that they gave no other notice than a mere statement of their application. If the allegations as to notice in the third paragraph of said bill should be deemed material I pray that complainants may be compelled to make full proof thereof.

IV. I deny that the subject of the right to this membership and the property thereto was a matter of discussion between complainants and myself and that there were repeated interviews between complainants and myself on the subject. I deny that there was any interview between us such as is alleged in the fourth paragraph of said bill in which one of the complainants said to me that I had better pay the annual dues and that complainants would not waive my right to have the same refunded out of the proceeds of the sale. On the contrary I aver that the membership was not mentioned between us and when it was so mentioned the complainants either expressly or tacitly conceded that there was nothing to be realized from it for the estate, and for four or five years prior to the petition mentioned in the seventh paragraph of the bill nothing whatever was said by either party to the other on the subject. I admit that at the time of the bankruptcy and even up to the present time the market value of the said membership would not have been equal to the amount due by me to my fellow-members and therefore would not have yielded anything to the estate in bankruptcy, and I aver that for this reason complainants for thirteen years while no effort whatever to preserve the membership, pay dues or assume any responsibility with regard to it.

V. I admit that the membership in the said association was not forfeited as said. I have no knowledge with respect to the other matters mentioned in the fifth paragraph of the bill.

17 VI. I admit that I was duly discharged as a bankrupt on October 3, 1873. At the time of my discharge my membership in said association had not been suspended, but as an insolvent member I had been suspended from the privileges of membership. Both before and after my discharge by my own personal exertions, I prevailed upon the members of the board not to insist upon a sale of my membership, but to keep it alive for my personal benefit. I paid regularly the assessments for the gratuity fund which was established by the association. After my discharge I paid to the members of the association who were creditors large sums of money on account of their personal claims against me. In 1883, having by these means paved the way for a request for that which was solely a matter of grace and not of right viz. a readmission to the privileges of membership, I applied for such readmission and after proceedings taken in accordance with the by-laws, I was duly readmitted upon payment of all the current dues, exclusive of gratuity assessments, which had already been paid.

VII. I admit the truth of the statements contained in the seventh paragraph of this bill.

VIII. I have no knowledge of the reasons for the decisions of the district and circuit courts mentioned in the eighth paragraph of said bill other than as appears by the record of the said proceedings.

IX. I aver that at the time of the bankruptcy the said membership had no present or prospective value as an asset of the estate in bankruptcy, and that in view of that fact complainants took no steps to preserve it, and carefully abstained, for thirteen years, from taking possession of or assuming any responsibility concerning it. It was saved from sale by my personal exertions and as a personal favor to myself on the part of the members of the association. Four years after the bankruptcy a benefit fund, in the nature of a life insurance, was established in the association, which added largely to the value of the memberships, but which required a constant
18 payment of assessments. These assessments I paid with my own moneys, earned after my discharge. I subsequently paid large sums of money earned after my discharge to my creditors in the association, and thus procured favorable action on my application for readmission to the privileges of the association. Any value which said membership has to-day is due solely to my own labor and expenditure after my bankruptcy. Without this labor and expenditure the membership would long ago have been forfeited, and even if it had not been so forfeited would not have been of any value to-day to the complainants. I have never threatened to interfere with any sale by the complainants of any interest they might have.

X. On February 13, 1885, for valuable consideration, I transferred said membership to Charles E. Yerkes, who, in accordance with the rules of the association, was afterwards duly elected a member.

I pray to be hence dismissed with my reasonable costs.

CHAS. T. YERKES, JR.

STATE OF ILLINOIS, }
County of Cook, } *ss:*

Charles T. Yerkes, Jr., being duly sworn, says that the statements contained in the foregoing answers are true to the best of his knowledge and belief.

CHAS. T. YERKES, JR.

Sworn and subscribed to before me this 3rd day of April, A. D. 1886.

[SEAL.] WALTER A. DODSON,
Notary Public.

19 (Endorsed:) 32. Oct. sess., 1885. U. S. C. C., eastern district Penna. Sparhawk *et al. vs.* Ackley *et al.* Separate answer of Charles T. Yerkes, Jr. Frank P. Prichard, solicitor for C. T. Yerkes, Jr. Filed Apr. 5, 1886.

20 And afterwards, to wit, on the 19th day of May, A. D. 1886 the complainants, by their attorney, comes into court here and files their replication in the words following, viz:

JOHN SPARHAWK *et al.* vs. CHARLES T. YERKES *et al.* } U. S. C. C. In Equity. 32. Oct. Sess., 1885.

The plaintiffs join issue as to the matters alleged in the answer of Charles T. Yerkes *et al.* who have filed answers.

GEO. JUNKIN,
Att'y for Pl'ffs.

May 19, 1886.

(Endorsed:) 32. Oct. sess., 1885. Sparhawk *vs.* Yerkes. U. S. C. C. In eq. Replication as to answer of Charles T. Yerkes. Filed 19 May, 1886. Junkin.

21 And afterwards, to wit, on the 28th day of January, A. D. 1887, the said Shreve Ackley and the other members of the Philadelphia Board of Brokers, by their attorney, A. Sydney Biddle, Esq., comes into court here and files their answer in the words and figures following:

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

No. 32. Of October Sessions, 1885.

In Equity.

JOHN SPARHAWK, GEORGE J. GROSS, and J. DAVIS DUFFIELD, Assignees in Bankruptcy of Charles T. Yerkes, Jr., a Bankrupt, Complainants,

vs.

SHREVE ACKLEY and Others, Members of the Philadelphia Board of Brokers, and CHARLES T. YERKES, Jr., the said Bankrupt, Respondents.

To the honorable the judges of the said court:

The separate answer of Shreve Ackley and the other defendants, who are members of the Philadelphia Board of Brokers, to the above bill of complaint respectfully showeth:

I. We admit the truth of the statements contained in the first paragraph of said bill, but we deny that the membership of C. T. Yerkes, Jr., passed thereby to the assignee.

22 II. We admit that at the time said Charles T. Yerkes, Jr., was adjudicated a bankrupt he was a member of an unincorporated association known as "The Board of Brokers" and now known as the "Philadelphia Stock Exchange." The statements in paragraph II of the bill as to the purpose and character of such association are substantially correct, except so far as it might be inferred therefrom that an insolvent member has a right to be reinstated upon the settlement of his indebtedness. He has no such right of readmission, but may be readmitted by vote of the members. With regard to the constitution, by-laws, and membership of the associa-

tion we annex hereto and ask leave to make part of our answer a copy of such constitution and by-laws and a list of the present members.

III. We admit that at the time of his insolvency said Charles T. Yerkes, Jr., was indebted to fifteen members of the said association in sums, as we are informed and believe, aggregating about $21,842.11, and was not indebted to the association. We deny that complainants gave any notice whatever to the said association or any of its officers either of their appointment or of any claim to the membership of Charles T. Yerkes, Jr., until November 19, 1883.

IV. We admit that at the time of the bankruptcy and up to the present time the value of said membership was not equal to the amount due by said bankrupt to his fellow-members at the time of his bankruptcy. We have no knowledge concerning the other matters referred to in the fourth paragraph of the bill.

V. We admit the truth of the statements contained in paragraph V of said bill.

VI. We admit that said Charles T. Yerkes, Jr., was duly discharged as a bankrupt on October 3, 1873. Afterwards he paid to the members of the association who were his creditors large sums of money, aggregating more than the value of his membership, in settlement of their claims, and on June 18, 1883, he was, upon applica-
23 tion, readmitted, in accordance with the mode prescribed in the constitution, to the privileges of membership. He had in the meanwhile by his personal exertions prevailed upon the creditor members not to insist upon a sale of his seat, and he had paid the assessments which fell due in consequence of the establishment of a gratuity fund after his suspension. At the time of his readmission to the privileges of membership he paid all the regular dues which had accrued during his suspension.

VII. We believe a membership at the present time to be worth about fifty-five hundred dollars. The price fluctuates considerably. We admit the other averments in paragraph VII.

VIII. We have no knowledge of the matters referred to in paragraph VIII of said bill.

IX. We deny that complainants had, at the time of filing said bill or at any time since, any right to or ownership in said membership of Charles T. Yerkes, Jr. Neither at the time of the complainants' appointment as assignees nor at any time since has it had a value equal to the aggregate preferred claims of the creditor members, and its value to Charles T. Yerkes, Jr., at the time of his readmission was due solely to his own care and expenditure and the fact that the defendants, members of the Philadelphia Stock Exchange, without any obligation upon their part to do so, chose to readmit him as a member in the mode prescribed by the constitution.

On February 13, 1885, said Charles T. Yerkes, Jr., transferred said membership to Charles E. Yerkes, who had been duly elected a member in accordance with the constitution and by-laws of the association.

X. All matters or things in said bill alleged which are not herein particularly admitted and which are material to the complainants'

suit are asked to be proven. We pray to be hence dismissed with our reasonable costs.

A. SYDNEY BIDDLE.
Solicitor for Defendants.

24 COUNTY OF PHILADELPHIA, *ss:*

Bushrod W. Adams, being duly sworn according to law, says that the facts set forth in the foregoing answer of his own knowledge are true, and that those set forth on the information of others he believes to be true.

BUSHROD W. ADAMS.

Sworn and subscribed this 22d day of January, A. D., 1886, before me—

[SEAL.] JOS. I. KNOX,
Notary Public for the Commonwealth of Penna.,
Residing in the City of Philadelphia.

25 [Endorsed:] 32. October sessions, 1885. Circuit court of the United States for the eastern district of Pennsylvania. In equity. Sparhawk *et al. vs.* Ackley *et al.* Answer of Shreve Ackley *et al.* A. Sydney Biddle, solicitor for defendants. Filed 28 Jan., 1887.

26 And afterwards, to wit, on the 18th day of March, A. D. 1887, the respective parties, by their attorneys, comes into court here and files the following agreement, viz:

JOHN SPARHAWK *et al.* *vs.* YERKES *et al.* } U. S. C. C. In Equity. No. 32. Oct. Sessions, 1885.

It is agreed that Charles E. Yerkes may be made a party defendant in this suit and that the answer filed by C. T. Yerkes shall be considered as the answer of Charles E. Yerkes also.

GEO. JUNKIN, *Att'y for Pl'ffs.*
FRANK P. PRICHARD,
Att'y for C. T. Yerkes and C. E. Yerkes.

(Endorsed:) 32. Oct. sess., 1885. Sparhawk *et al. vs.* Yerkes *et al.* U. S. C. C. In equity. Agreement to make Charles E. Yerkes a party defendant. Filed 18 Mar., 1887. Junkin; Prichard.

27 And afterwards, to wit, on the 18th day of March, A. D. 1887, on motion of Messrs. Junkin and Prichard, attorneys for parties, the court makes the following order:

SPARHAWK *et al.* *vs.* YERKES *et al.* } U. S. C. C. In Equity. No. 32. Oct. Sess., 1885.

And now, March 18th, 1887, on motion of Messrs. Junkin and Prichard, attorneys for parties, the court appoint Joseph Mason, Esq., examiner and master in the above case.

We request and agree that the above order may be made.

GEO. JUNKIN, *Att'y for Pl'ffs.*
A. SYDNEY BIDDLE,
For Members of Phila. Stk Exch., Def'ts.
FRANK P. PRICHARD,
Atty for Yerkes et al.

(Endorsed:) No. 32. Oct. sess., 1885. Sparhawk *et al. vs.* Yerkes *et al.* U. S. C. C. In eq. Appointment of examiner. Filed 18 Mar., 1887. Junkin; Prichard.

(Pp. 28 to 107, incl., omitted in printing. See stipulation at p. 126.)

108 SPARHAWK *vs.* YERKES.

Per Curiam:

The property to which this controversy relates is of a peculiar character. It is incorporeal, consisting of the defendant's membership or a right to seats in two associations called the New York Board of Brokers and the Philadelphia Board of Brokers. By the rules of these associations this property was charged with certain debts due to their members and with a liability for future assessments, which charges are inseparable from the ownership and the right to dispose of or control the property. It could only then pass to the complainants, as the assignees of the defendant, subject to the conditions under which he held it and to their explicit acceptance of them. This is the result of numerous decisions in this country and in England.

The property was not unconditionally devolved upon the complainants by the assignment. They might accept it *cum*
109 *onere* or they might decline to accept it, and thereby preclude the subjection of the other assets assigned to them to additional burdens, or they might have sold the problematical interest of the defendant in it; but it was incumbent on them to manifest their acceptance of it or their purpose to accept it within a reasonable time after their right accrued or lose it by undue delay.

For a period of at least twelve years the complainants were purposely quiescent or inactive in asserting any acceptance of the property or in exercising any control over it, and this is especially significant of their purpose not to accept it in view of the fact that it was set down in the appraisement as of no value. In the meantime it was saved from adverse disposition or forfeiture by the efforts and large expenditure of money of the defendant.

Laches so conspicuous and expressive as has been exhibited in this case is sufficient to deny the interposition of a court of equity and to justify a presumption of an intent on the part of the complainants to forego any purpose to withdraw the property
110 from the care and control of the defendant. We think the relief prayed for ought not to be granted.

The exceptions to the master'- report are therefor- overruled and the bill dismissed with costs.

(Endorsed :) Nos. 31 & 32. October, 1885. C. C. U. S., E. D. of Pa. Sparhawk *vs.* Yerkes. Opinion. Filed Apr. 27, 1888. Samuel Bell, clerk.

111 And afterwards, to wit, on the 28th day of April, A. D. 1888, the court enters the following decree, viz:

In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

SPARHAWK *et al.*, Assignees, &c., *vs.* YERKES *et al.* } No. 31. October Sess., 1885.

And now, to wit, this 28th day of April, A. D. 1888, this cause having been set for hearing on exceptions to the report of the master, and coming on now to be finally heard thereon, and being argued by counsel and submitted to the court, and the court having considered the same and being sufficiently advised in the premises—

It is ordered, adjudged, and decreed that the report of the
112 master be confirmed; and it is further ordered, adjudged, and decreed that the bill of complaint herein be, and the same is hereby, dismissed, and that the respondents have and recover their costs and charges, taxed at $——, from and of the complainants.

(Endorsed:) No. 32. Oct. sess., 1885. C. C. U. S., E. D. of Pa. Sparhawk *et al.*, assignees, &c., *vs.* Yerkes *et al.* Decree. Filed April 28, 1888.

113 And afterwards, to wit, on the 10th day of May, A. D. 1888, the complainants, by their attorney, George Junkin, Esq., comes into court here and prays an appeal to the Supreme Court of the United States in the words and figures following, viz:

In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

SPARHAWK, Assignees, &c., *vs.* YERKES. } No. 32. October Sess., 1885.

And now, to wit, this 10th day of May, A. D. 1888, George Junkin, Esq., counsel for complainants, appears in open court and prays an appeal to the Supreme Court of the United States from the decree of this court, entered and filed the 28th day of April, A. D.
114 1888, dismissing the bill of complaint with costs in the above case.

Whereupon the same is allowed, with security, in the sum of five hundred dollars ($500).

(Endorsed:) 32. Oct. sess., 1885. C. C. U. S., E. D. of Pa. Sparhawk *et al.*, assignees, &c., *vs.* Yerkes *et al.* Order allowing appeal. Filed May 10, 1888.

115 THE UNITED STATES OF AMERICA, *ss:*

To Shreve Ackley, Bushrod W. Adams, F. C. Arnold, J. Bell Austin, Herman F. Bachman, Meredith Bailey, Frederick Bain, Abraham Barker, W. Barker, Chas. D. Barney, C. M. Bayard, W. M. Bayard, John P. Bell, Henry Bentley, Lloyd W. Bickley, H. W. Biddle, T. A. Biddle, A. Biddle, J. T. Bingham, Chas. H. Bieron, John Bieron, Wm. M. Blakeslee, Henry Borden, Chas. L. Borie, H. W. Boureau, Ezra Bowen, N. Brice, P. H. Brice, R. B. Brinton, Jr., C. Camblos, Jr., G. W. Camblos, Wm. P. Camblos, Wm. G. Carver, J. G. Cassatt, W. S. Carrigan, S. W. Colton, Jr., J. Milton Colton, J. Hicks Conrad, Harry Connelly, J. Cooke, Jr., Robert B. Davidson, John H. Davis, Jas. S. Davidson, A. H. De Haven, H. De Haven, F. M. Dick, J. H. Dingee, Jr., Jos. D. Invilliers, A. J. Drexel, Francis H. Duffee, John W. Dulles, Robert M. Dunn, Wm. Edge, S. M. Elliot, Wm. Elliot, Rudolph Elliot, Wm. H. Ely, H. L. Fell, A. D. Fell, Walter P. Fell, W. R. Fisher, C. M. Fleming, G. S. Fox, Caleb F. Fox, D. B. Fox, J. M. Fox, David A. Freed, C. F. Frothingham, H. L. Gaw, H. L. Gaw, Jr., Wm. Gerlach, Geo. Gilpin, R. Glendinning, Jr., Edw. Gove, Theo. R. Graham, Edgar C. Gramm, J. Ralston Grant, Jas. M. Greggs,
116 Lindley Haines, C. E. Haines, W. P. Hallowell, Oswald T. Hanna, J. C. Harris, G. Heberton, W. Y. Heberton, Craig Heberton, E. Henderson, G. M. Hickling, R. F. Hickling, G. W. Hobson, Jas. Hopkins, Wm. G. Hopper, G. R. Horner, Jno. G. Howard, Wm. G. Huey, Geo. A. Huhn, J. N. Hutchinson, Francis Huth, R. M. Janney, B. K. Jamison, John C. Johnson, I. C. Jones, Jr., J. H. Jones, R. D. Jones, Chas. H. Jordan, C. B. Keen, E. W. Keene, D. Kennedy, W. T. Kingsley, Louis S. Kite, T. C. Knight, R. J. W. Koons, W. W. Kurtz, Thos. L. Lawson, W. L. Lawson, H. H. Lee, H. A. Lentz, S. L. Levy, E. C. Lewis, H. W. Lippincott, C. E. Lloyd, J. Lloyd, Wm. H. Lloyd, Jno. B. Love, Kirk W. Magill, E. V. Maitland, J. J. Maitland, Jno. A. Maitland, W. W. Maris, H. Markoe, J. Markoe, R. T. Martin, Dion M. Martinez, E. W. Matthews, C. L. Matthews, Geo. Meade, C. A. McManus, Wm. J. McLaughlin, Robert Mollly, Gordon Monges, R. H. Moon, E. J. Moore, W. C. Morgan, Jr., Wm. J. Morris, John R. Moss, T. C. Musgrove, Harry F. Newhall, C. H. Needles, Jr., Chas. Newkirch, C. B. Newbold, L. H. Niles, G. H. North, W. F. North, Chas. H. Oberge, Edw. D. Page, Geo. W. Palmer, E. B. Paul, M. B. Paxson, Frederick Paxson, Harry Peale, W. J. Peale, C. L. Peterson, Chas. G. Phillips, Wm. C. Pierce, H. C. Potter, Geo. C. Potts, R. F. Raley,
117 John C. Ritchie, Edw. Robins, E. J. Robinson, John Sailer, Lewis Seal, Jos. H. Seaver, Jos. H. Shelmerdine, E. H. Stevens, D. C. W. Smith, F. Percy Smith, Winthrop Smith, J. Rundle Smith, Frank Smyth, Edw. Starr, Benj. Sterling, Geo Stevenson, Wm. H. Stevenson, H. H. St. John, Chas. M. Stokes, Jos. H.

Straub, Edwin Swift, Wm. Sinnett, Clarence Taylor, J. R. Taylor, L. H. Taylor, Jr., John M. Taylor, Joshua Tevis, Wm. H. Tevis, Geo. C. Thomas, S. H. Thomas, David S. Thompson, Augustus Thouron, C. M. Town, H. L. Townsend, R. H. Townsend, Jr., Eugene Townsend, Jos. Trotter, J. G. Watmough, R. H. Watson, Chas. F. Webb, L. L. Webster, J. N. Whelen, W. N. Whelen, H. H. Wiltbank, J. K. Wildman, Henry W. Wise, J. K. Worthington, Chas. B. Wright, Chas. E. Yerkes, and T. S. Young, members of the Philadelphia Board of Brokers, and Charles T. Yerkes, Jr., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an
118 appeal from a decree filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein John Sparhawk, George J. Gross, and J. Davis Duffield, assignees in bankruptcy of Charles T. Yerkes, Jr., a bankrupt, — appellants and you are appellees, to show cause, if any there be, why the decree rendered against said appellants, as in said appeal mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 18th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

WM. BUTLER, *Judge.*

I accept service of the within citation.

A. SYDNEY BIDDLE,
Att'y for the Within-Named Defendants (Except Charles T. Yerkes, Jr., and Chas. E. Yerkes).

I accept service of the within citation.

FRANK P. PRICHARD,
Att'y for Charles T. Yerkes, Jr., and Charles E. Yerkes.

5, 19, '88.

119 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

JOHN SPARHAWK *et al.* vs. CHARLES T. YERKES, Jr., *et al.* } No. 32. In Equity. October Sess., 1885.

Know all men by these presents that we, John Sparhawk, George J. Gross, and J. Davis Duffield, assignees in bankruptcy of Charles T. Yerkes, Jr., a bankrupt, complainants in the above case and appellants, and "The City Trust, Safe Deposit and Surety Company," are held and firmly bound unto the above-named Shreve Ackley, Bushrod W. Adams, F. C. Arnold, J. Bell Austin, Herman F. Bachman, Meredith Bailey, Frederick Bain, Abraham Barker, W. Barker, Chas. D. Barney, C. M. Bayard, John P. Bell, Henry Bentley, Lloyd W. Bickley, H. W. Biddle, T. A. Biddle, A. Biddle, J. T. Bingham, Chas. H. Bieron, John Bieron, Wm. M. Blakeslee, Henry Borden,

Chas. L. Borie, H. W. Boureau, Ezra Bowen, N. Brice, P. H. Brice, R. B. Brinton, Jr., C. Camblos, Jr., G. W. Camblos, Wm. P. Camblos, Wm. Y. Carver, J. G. Cassatt, W. S. Carrigan, S. W. Colton,
120 Jr., J. Milton Colton, J. Hicks Conrad, Henry Connelly, J. Cooke, Jr., Robert B. Davidson, John H. Davis, Jas. S. Davidson, A. H. De Haven, F. M. Dick, J. H. Dingee, Jr., Jos. D'Invilliers, A. J. Drexel, Francis H. Duffee; John W. Dulles, Robert M. Dunn, Wm. Edge, S. M. Elliot, Wm. Elliot, Rudolph Elliot, Wm. H. Ely, H. L. Fell, A. D. Fell, Walter P. Fell, W. R. Fisher, C. M. Fleming, G. S. Fox, Caleb F. Fox, D. B. Fox, J. M. Fox, David A. Freed, C. F. Frothingham, H. L. Gaw, H. L. Gaw, Jr., Wm. Gerlach, Geo. Gilpin, R. Glendinning, Jr., Edw. Gove, Theo. R. Graham, Edgar C. Gramm, J. Ralston Grant, Jas. M. Greggs, Lindley Haines, C. E. Haines, W. P. Hallowell, Oswald T. Hanna, J. C. Harris, G. Heberton, W. Y. Heberton, Craig Heberton, E. Henderson, G. M. Hickling, R. F. Hickling, G. W. Hobson, Jas. Hopkins, Wm. G. Hopper, G. R. Horner, Jno. G. Howard, Wm. G. Huey, Geo. A. Huhn, J. N. Hutchinson, Francis Huth, R. M. Janney, B. K. Jamison, John C. Johnson, I. C. Jones, Jr., J. H. Jones, R. D. Jones, Chas. H. Jordan, C. B. Keen, E. W. Keene, D. Kennedy, W. T. Kingsley, Louis S. Kite, T. C. Knight, R. J. W. Koons, W. W. Kurtz, Thos. L. Lawson, W. L. Lawson, H. H. Lee, H. A. Lentz, S. L. Levy, E. C. Lewis, H. W. Lippincott, C. E. Lloyd, J. Lloyd, Wm. H. Lloyd, Jno. B. Love, Kirk W. Magill, E. V. Maitland, J. J. Maitland, Jno. A. Maitland, W. W. Maris, H. Markoe, J. Markoe, R. T. Martin, Dion M. Martinez, E. W. Matthews, C. L. Matthews, Geo. Meade, C. A.
121 McManus, Wm. J. McLaughlin, Robert Mollly, Gordon Monges, R. H. Moon, E. J. Moore, W. C. Morgan, Jr., Wm. J. Morris, John R. Moss, T. C. Musgrove, Harry F. Newhall, C. H. Needles, Jr., Chas. Newkirch, C. B. Newbold, L. H. Niles, G. H. North, W. F. North, Chas. H. Oberge, Edw. D. Page, Geo. W. Palmer, E. B. Paul, M. B. Paxson, Frederick Paxson, Harry Peale, W. J. Peale, C. L. Peterson, Chas. G. Phillips, Wm. C. Pierce, H. C. Potter, Geo. C. Potts, R. F. Raley, John C. Ritchie, Edw. Robins, E. J. Robinson, John Sailer, Lewis Seal, Jos. H. Seaver, Jos. H. Shelmerdino, E. H. Stevens, D. C. W. Smith, F. Percy Smith, Winthrop Smith, J. Rundle Smith, Frank Smyth, Edw. Starr, Benj. Sterling, Geo. Stevenson, Wm. H. Stevenson, H. H. St. John, Chas. M. Stokes, Jos. H. Straub, Edwin Swift, Wm. Sinnett, Clarence Taylor, J. R. Taylor, L. H. Taylor, Jr., John M. Taylor, Joshua Tevis, Wm. H. Tevis, Geo. C. Thomas, S. H. Thomas, David S. Thompson, Augustus Thouron, C. M. Town, H. L. Townsend, R. H. Townsend, Jr., Eugene Townsend, Jos. Trotter, J. G. Watmough, R. H. Watson, Chas. F. Webb, L. L. Webster, J. N. Whelen, W. N. Whelen, H. H. Wiltbank, J. K. Wildman, Henry W. Wise, J. K. Worthington, Chas. B. Wright, Chas. E. Yerkes, and T. S. Young, members of the Philadelphia Board of Brokers, and Charles T. Yerkes, Jr., and Charles E. Yerkes, respondents, in the sum of five hundred dollars ($500), to be paid to the said Charles T. Yerkes, Jr., and the other of the grantees just named,
122 their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind our-

selves, our respective heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twelfth day of May, A. D. 1888.

Whereas lately, at a circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in the said court between the said John Sparhawk *et al.*, complainants, and Charles T. Yerkes, Jr., *et al.*, as defendants, a final decree was rendered against the said John Sparhawk *et al.*, and the said John Sparhawk, George J. Gross, and J. Davis Duffield having taken an appeal, which appeal has been allowed by the circuit court, to the Supreme Court of the United States to reverse the said decree in the aforesaid suit:

Now, the condition of this obligation is such that if the said John Sparhawk, George J. Gross, and J. Davis Duffield or either of
123 them, assignees as aforesaid, shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their appeal good, then this obligation to be null and void; otherwise to remain in full force and virtue.

JOHN SPARHAWK,
GEORGE J. GROSS.
J. DAVIS DUFFIELD,
Assignees in Bankruptcy, Est. of Charles T. Yerkes, Jr.
THE CITY TRUST, SAFE DEPOSIT AND SURETY CO. OF PHILADELPHIA.
[SEAL.] CHAS. M. SWAIN, *President.*

Attest: JAMES F. LYND, *Sec'ty.*

Sealed and delivered in presence of—
As to John Sparhawk:
CHARLES G. MAYHEW.
JULIUS B. PRICE, JR.

As to George J. Gross:
GEORGE J. GROSS, JR.
W. H. LIVINGOOD.

As to J. Davis Duffield:
EF. V. MORRIS.
T. J. MURRAY.

Approved.
WM. BUTLER, *Judge.*

124 (Endorsed:) No. 32. October sess., 1885. C. C. U. S., E. D. of Pa. Sparhawk *et al.*, assignees, &c., *vs.* Yerkes *et al.* Bond on appeal. Filed May 18, 1888. Samuel Bell, clerk.

125 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third cir-

cuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of John Sparhawk *et al.*, assignees, &c., *vs.* Shreve Ackley *et al.*, No. 32, October session, 1885, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 28th day of May, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk of C. C.

126 JOHN SPARHAWK *et al.*, Assignees, Appellants,
v.
SHREVE ACKLEY *et al.*, Appellees.
} S. C. U. S. October Term, 1890. No. 372.

It is agreed that the matter contained in the above record between pages 28 and 107, inclusive, in original on file be omitted from the printed record. It is further agreed that the matter between the above pages is identical with the matter found in record No. 371, October term, 1890, between original pages 10 and 118, inclusive (print between pages 16 and 61), and the contents of the said record between the said last-mentioned pages are to be considered for all purposes as incorporated in record No. 372.

WAYNE MacVEAGH,
A. H. W.,
Attorney for Appellants.
A. SYDNEY BIDDLE,
For Ackley et al., Appellees.
FRANK P. PRICHARD,
Attorney for Appellee, Chas. T. Yerkes, Jr.

127 [Endorsed:] October term, 1890. S. C. U. S. No. 372. John Sparhawk *et al.*, assignees, appellants, *vs.* Shreve Ackley *et al.*, appellees. Agreement for omission of part of record in printing.

[Stamped:] Office Supreme Court U. S. Filed Feb. 11, 1891. James H. McKenney, clerk.

Endorsed on cover: E. Pennsylvania C. C. U. S. No. 372. John Sparhawk, George J. Gross, and J. Davis Duffield, assignees in bankruptcy of Charles T. Yerkes, Junior, a bankrupt, appellants, *vs.* Shreve Ackley, Bushrod W. Adams, F. C. Arnold, J. Bell Austin, Herman F. Bachman, Meredith Bailey, *et al.*, members of the Philadelphia Board of Brokers, and Charles T. Yerkes, Junior. Filed June 1, 1888.

Office Supreme Court U. S.
FILED.
OCT 9 1891.
JAMES H. MCKENNEY

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

JOHN SPARHAWK, GEORGE J. GROSS, AND J. DAVIS DUFFIELD, ASSIGNEES IN BANKRUPTCY OF CHARLES T. YERKES, JR., A BANKRUPT, APPELLANTS,

vs.

CHARLES T. YERKES, JR., A BANKRUPT; JOSEPH G. CASSATT, ET AL., MEMBERS OF THE NEW YORK BOARD OF BROKERS, APPELLEES.

No. 56.

JOHN SPARHAWK, GEORGE J. GROSS, AND J. DAVIS DUFFIELD, ASSIGNEES IN BANKRUPTCY OF CHARLES T. YERKES, JR., A BANKRUPT, APPELLANTS,

vs.

SHREVE ACKLEY, ET AL., MEMBERS OF THE PHILADELPHIA BOARD OF BROKERS, AND CHARLES T. YERKES, JR., APPELLEES.

No. 57.

Appeals from the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF OF APPELLANTS
AND
AGREEMENT OF ATTORNEYS.

WAYNE MACVEAGH,
For Appellants.

In the Supreme Court of the United States.

JOHN SPARHAWK, GEORGE J. GROSS AND J. DAVIS DUFFIELD, Assignees in Bankruptcy of CHARLES T. YERKES, JR., a Bankrupt, *Appellants*,

vs.

CHARLES T. YERKES, JR., a Bankrupt; JOSEPH G. CASSATT, *et al.*, Members of the New York Board of Brokers, *Appellees*.

October Term, 1891. No. 56.

JOHN SPARHAWK, GEORGE J. GROSS, AND J. DAVIS DUFFIELD, Assignees in Bankruptcy of CHARLES T. YERKES, JR., a Bankrupt, *Appellants*,

vs.

SHREVE ACKLEY, *et al.*, Members of the Philadelphia Board of Brokers, and CHARLES T. YERKES, JR., *Appellees*.

October Term, 1891. No. 57.

STATEMENT OF THE CASE.

The cases arose on Bills in Equity filed in the Court below by the appellants, who are the Assignees in bankruptcy of Charles T. Yerkes, Jr., a bankrupt, against the said Yerkes and the members of the New York and Philadelphia Stock Exchanges, for the purpose of establishing and protecting the complainants' right of property in seats in these Stock Exchanges owned by Yerkes at the time of his bankruptcy, and securing for the estate in bankruptcy the money value of the said seats either by a sale thereof or by an accounting for their value by the said Yerkes, who holds possession of them against the rights of the complainants.

Charles T. Yerkes, Jr., trading as Charles T. Yerkes, Jr., & Co., was adjudicated a bankrupt in the District Court of the United States for the Eastern District of Pennsylvania, December 13, 1871, on creditor's petition filed November 10, 1871. He then owned a membership in the New York Board of brokers, known commonly as The New York Stock Exchange, and also a membership in The Philadelphia Board of Brokers, known as The Philadelphia Stock Exchange, both unincorporated associations (Rec. p. 45, fol. 83; p. 16, fol. 41). These memberships were included in the schedules filed by the bankrupt in the bankruptcy proceedings, and were stated by him to be "of no specific value."

The complainants were appointed assignees of the bankrupt, January 12, 1871, and the bankrupt's estate was duly vested in them by assignment January 24, 1872, and duly recorded, which vested in them the estate, rights and credits of the bankrupt as of November 10, 1871. Yerkes received his final discharge as a bankrupt October 3, 1873.

Ninety-nine creditors proved debts, inclusive of secured creditors, in an aggregate sum of $829,198.45, upon which, up to the time of the filing of the bills, dividends were declared as follows: July 19, 1872, 10 per cent.; May 12,

1873, 9 per cent.; April 5, 1878, 8 per cent.; and January 30, 1880, 1 per cent. (See agreement at end of brief.)

The seats in the Exchanges were not immediately available as assets to be realized upon to the estate, because of the fact that Yerkes' debts to members of the Exchanges exceeded considerably the then market values of the seats, and because under the rules of each Exchange, the proceeds of the sale of the seat of an insolvent member were first payable to his creditors in the Exchange, to the extent of their claim. (Rec. pp. 36, 39, fols. 67, 71.)

Accordingly, nothing more was deemed necessary to be done at once by the assignees upon procuring title to this portion of the bankrupt's property, than to see that the only other parties interested in the fact–the two Exchanges–received notice of the devolution of title to the assignees, and of their claim to the value of the seats. Notices to this effect were sent to the two Boards January 25 and 27, 1872, and additional notices were sent to the New York Exchange, and also to the Philadelphia Exchange on or about May 29, 1883, and subsequently on November 19. (Rec. 25, 26, 32, fols. 53, 54, 62.) The value of the seats in both the Exchanges increased considerably from year to year. In the New York Board the value increased from about $4,000 at the time of the adjudication in bankruptcy to upwards of $20,000 in 1883; and in the Philadelphia Board the appreciation was from a maximum value of $2,000 in 1871, to $6,000 in 1883. (Rec. pp. 20, 21, 39, 40, fols. 47, 48, 72.) There was a further appreciation of the value of these stock board seats to between $30,000 and $34,000 in the case of the New York seat, and to between $5,000 and $8,000 in the case of the Philadelphia seat, as is shown by paragraph VII of the bills of the complainants and admitted in paragraph VII of the answers of Yerkes. (Rec. I. pp. 4, 12; Rec. II. pp. 6, 9.) During the interval of time, according to the testimony of one of the assignees, they maintained with Yerkes, the bankrupt, their right and title to these seats (Rec. p. 30, fol. 60),

and on one occasion, when a notice of dues to one of the Boards was submitted by the bankrupt, it was proposed, with his apparent acquiescence, that he should pay such claims and be reimbursed by the assignees out of the proceeds of the sales of the seats. (Rec. p. 31, fol. 61.)

By the rules of the Exchanges, insolvency of a member, or failure to fulfil his contracts, as well as bankruptcy, specifically in one of them, worked his suspension of membership. And in the rules of both boards there was a provision for the sale of the seats after one year on failure of the suspended member to settle with his creditors. (Rec. p. 37, fol. 68; p. 39, fol. 71). In the case of the New York Board there was a provision for the extension of the time for settlement (Rec. p. 39, fol. 71). Yerkes was readmitted to the privilege of his seat in the Philadelphia Exchange on June 18, 1883, and in the New York Exchange December 27, 1883, without notice to the assignees from him or from the Exchanges; and he thereupon claimed title to the seats to the exclusion of the assignees.

The assignees then again, as before, asserted their right and title (fol. 49), and upon Yerkes' refusal to recognize their claim or offer to account for the value of the seats, invoked the aid of the bankruptcy court by petition filed April 28, 1884 (p. 42). Relief was denied by the court in the absence from the record of the members of the Exchanges (p. 53). Thereupon, all the parties were brought together on the record by formal complaints in equity filed November 19, 1885. The cases were referred to a master, who recommended dismissal of the bills. The Court took the ground that the complainants were guilty of laches and the bills were dismissed (Rec. p. 61). The Master, when sitting as Register, had found that it did not appear that there was ever any declared abandonment by the assignees to the bankrupt (Rec. p. 52, fol. 97), but the Court found such laches as, in its opinion, justified a presumption of abandonment. Yerkes, it was testified,

had made payments in money to his creditors and made settlements with them (Rec. pp. 21, 22 ; fols. 47, 48, 49, 58) with funds of his own acquired after his discharge. This fact was also operative in determining the Court's decision. These appeals were then taken.

The principal question involved is that of title to these seats as between the bankrupt and his assignees, and the right to their proceeds when sold. If they are not to be sold, the question arises as to the obligation of the bankrupt to account to the assignees for the market value of the seats subject to deduction therefrom of the amount of annual dues, assessments and charges which have been paid by him with the concurrence and authorization of the assignees.

The appellants' right to reimbursement from Yerkes for moneys paid in dividends by the assignees to his stock board creditors who proved debts, also presents itself if it be held that the assignees are not entitled to the seats or to their proceeds, and that the bankrupt is not obliged to account to them for their market value.

The question of the right of Yerkes to a credit on the market value of the seats, in case he is held to account therefor to his assignees, for the amount of money paid by him and the value of services rendered by him to them is likewise to be determined.

SPECIFICATION OF ERRORS.

1. The court below erred in dismissing the complainants' bills.

2. The Court below erred in not entering a decree in each case in accordance with the second prayer for relief in the bills, which prayer was as follows:

Second Prayer. "That it may be decreed that the said membership in the said association was an asset of the said bankrupt's estate, which passed to, and is now vested in your orators as his assignees.

3. The Court below erred in not entering a decree in each case in accordance with the third prayer for relief in the bills, which prayer was as follows:

Third Prayer. "That a sale of the said membership may be decreed by your honors, and the said Charles T. Yerkes, Jr., and the said association and all of its members may be restrained by the order or injunction of your honors from interfering with the sale of the same, and be decreed to admit the vendee of your orators to full membership in the said board or association in the place of the said Charles T. Yerkes, Jr."

4. The Court below erred in not entering a decree in each case in accordance with the fourth prayer, which prayer was as follows:

Fourth Prayer. "That the proceeds of the said sale when so made may be paid to your orators for distribution among the creditors of the said bankrupt."

5. The Court below erred in not entering a decree in each case in accordance with the sixth prayer which prayer was as follows:

Sixth Prayer. "If it should be determined by the Court that the said Charles T. Yerkes, Jr., had the right to retain the said membership in the said association as against your orators, that he be ordered to account for the market value of the same, and to pay to your orators such amounts as they have paid as dividends upon the debts

due by him to his fellow-members of the said association at the time of the said insolvency and bankruptcy, and which debts were a lien upon said membership, together with interest thereon."

6. The Court below erred in denying the eighth prayer for general relief.

A BRIEF OF THE ARGUMENT.

The radical error into which the master and the court below fell, was in treating the cases before them as if they were ordinary litigations between parties at arms' length whose interests in law and in fact were, and had been, continuously adverse.

The obligations of the assignees toward the bankrupt as to the property they were administering, and his obligations to them, were assumed for all purposes to be the same as those existing between hostile claimants to property. The equitable doctrine of laches was invoked and made the basis for the decision adverse to the complainants, just as if the bankrupt were and had been continuously a stranger to the estate and to the assignees, and had no duties toward it and toward them, and the delay, on their part, in the interest of the estate, in administering and realizing upon an asset admitted to have passed to them, was solemnly declared by the court to have been equivalent to a process of ripening title in the one man in all the world whose duty it was to assist in realizing upon the asset for the assignees and for his creditors.

How signally wide of a just conclusion this view was, is seen in a glance at a few central facts of record. The bankrupt scheduled the seats among his assets, and thereby admitted that they passed, and signified his intention that they should pass, to the assignees (Rec. I. fols. 4, 24. Rec. II. fols. 8, 15).

The assignees both distinctly testified that they always asserted to Yerkes their claim of title to these seats.

(Rec. 1, fols. 105, 106, 60.)

Yerkes in two irresponsive answers to cross questions attempts to have the contrary inferred from his "understanding" of their attitude toward the claims (p. 24, fols. 52, 53). But it will be noticed he does not state conversations to support this understanding. Mr. Duffield, one of the assignees, swears to the fact that he suggested to Yerkes the payment by him of stock exchange dues which would be "*refunded to him out of anything the assignees might hereafter realize for the seats in the boards*" (fol. 61). The fact of this statement having been made is not denied by Yerkes.

In view of this evidence, it must be taken for a fact, therefore, that Yerkes knew that the claim of the assignees existed and was, and was to be, insisted upon.

Nevertheless, watching the appreciation in value of the seats from year to year, finally in 1883, when they had reached a considerable value, he quietly proceeds to appropriate them by procuring his own readmission to the Exchange.

He gives no notice whatever of the fact to the assignees (Rec. I, fols. 106, 107), leaving it to them to find out as best they might.

During all these years he stands by, watching without protest his creditors of the Exchange prove their claims and take their dividends out of the general assigned estate to the amount of twenty-eight per cent. upon the claims proved, which in the case of the creditors in the New York Exchange was $2,263.29, and in the case of the creditors in the Philadelphia Exchange was about $6,889.61. (Rec. I, fols. 56, 73, 74, 42; Rec. II, fol. 10.)

He thereby encouraged the claim that the seats were the property of the assignees, and that by the action of the latter their net value to the assignees was being enhanced by the reduction of claims upon the seats.

In the light of these facts, the view taken by the Court was not only inadequate; it was radically wrong. The essential proposition suggested by the case which, it is submitted, should determine its disposition, is that

I.

YERKES IN DEALING WITH HIS FELLOW-MEMBERS OF THE EXCHANGES, AND IN PROCURING HIS PERSONAL REINSTATEMENT TO THE SEATS FROM WHICH HE HAD BEEN SUSPENDED, ACTED IN EFFECT AS AGENT OR TRUSTEE FOR THE ASSIGNEES AND THE BODY OF HIS CREDITORS, AND HIS ACQUISITION OF THE SEATS INURED TO THEIR BENEFIT.

With this position duly appearing and properly recognized, all the remaining questions in the case find easy answer, and the prevailing equities of the complainants obtain their just place in the discussion.

The evidence, as has been seen, warrants the conclusion that as to the payment of dues to the Exchanges, Yerkes acted under an understanding with the assignees and practically for them. Nor does it make any difference in this regard that in the case of the Philadelphia Board seat (however it may have been with the New York Board seat) that Yerkes failed to pay the dues *until after* his re-instatement, and only paid the gratuity assessments (testimony of Sec. and Treas. Johnson, p. 40, fol. 72) which statement conflicts with Yerkes' own testimony that he paid all the charges, expenses, dues, assessments, etc., (p. 21, fol. 48). In the payments to his stock board creditors he acted without their authority, and was a mere volunteer.

(Rec. I, p. 33, fol. 64).

The title to the seats acquired by him through these means was the assignees'.

Section 5046 of the Revised Statutes provides: "All rights in equity, choses in action (of the bankrupt) * * *; all his rights of action for property or estate, real or personal, * * *; and *all his rights of redeeming* such prop-

erty or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover and defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, * * * * be at once vested in such assignee."

Here was a plain statutory declaration that the title to these seats, subject to the claims of the members of the boards, vested in the assignees.

"Assignees' duties relate chiefly to unsecured creditors." Mr. Chief Justice Waite, in *McHenry* vs. *La Societé Francaise d'Epargnes*, 95, U. S. p. 58.

"The leading purpose of the bankrupt law is to secure an equal distribution of the bankrupt's property among his creditors." Mr. Justice Davis in *Avery* vs. *Hackley*, *20 Wall, p. 413*. Speedy distribution is second in importance to equality of distribution. Mr. Justice Miller in *Baily* vs. *Glover*, 21 Wall, p. 346. "Equal distribution of the property of the bankrupt pro rata is the main purpose which the Bankrupt Act seems to accomplish." Mr. Justice Clifford, in *Buchanan* vs. *Smith*, 16 Wall, p. 301. *Wagner* vs. *Hall*, 16 Wall, 601; *Merchants Nat. Bk.* vs. *Cook*, 95 U. S. 342. "And fraud upon the equality of right among creditors of the bankrupt is committed when proof of debt is made by secured creditor without mentioning lien." Bennett, J., in *Starks* vs. *Curd*, 88 Ky., 164.

That a stock exchange seat is property or estate within the statute, and that it passes to assignees in bankruptcy, has been already decided by this Court. Said the Court in *Hyde* vs. *Woods*, 94, U. S. 523, 524, speaking of a seat in the San Francisco Stock Exchange such as these: "There can be no doubt that the incorporeal right which Fenn had to this seat when he became bankrupt was property, and the sum realized by the assignees from its sale proves that it was valuable property. Nor do we think

there can be any reason to doubt that, if he had made no such assignment, it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy."

In re Warder, 10 Fed. Red., 275.
In re Warder, 15 Fed. Rep., 789.
Powell vs. *Waldron*, 89 N. Y., 328.
Grocers' Bank vs. *Murphy*, 60 How. Pr., 426.
Clute vs. *Loveland*, 68 Cal., 254.
Habenicht vs. *Lissak*, 78 Cal., 351.

The Register in Bankruptcy, to whom the present case in one of its stages was referred, concedes this much. (Rec. p. 48).

The case of *Hyde* vs. *Woods*, also decides that such property under the rules of the exchange existing in that case, and also in the present, is lawfully subject to pledge for the debts of the members. But the statue steps in at this point and specifically declares that all the bankrupt's rights of redeeming such property or estate passes to the assignees. With these rights of the assignees known and well understood by the bankrupt, negativing as they did, unless the assignees plainly and unequivocally disclaimed title, any right in himself excepting as acting for them, what does Yerkes do? He proceeds to redeem the seats for himself, through his settlements, by rendering services to his creditors in the Stock Exchanges, and paying them sums of money over and above that paid by the assignees, in order to procure the restoration to him of these seats. (Rec. I, p. 20, 22.)

And then, upon voluntarily relieving the seats of their incumbrances he procures his own readmission, and comes before the world as owner, and claims for his title to them the protection of a court, *because he in part redeemed them.* This is substantially the essence of his claim. So far as the payment of money was a redemption, the fact was that the assignees furnished more money to redeem the New York seat; the only money paid by Yerkes to New York Stock Exchange creditors being, as he states,

the amount of Berdell's claim, $643.59 (Rec. p. 22) while the assignees paid in dividends to them $2,263.29.

It is submitted that the claim is no more meritorious as against the assignees who had not disclaimed title, than would be the claim of any third person who might have paid off the debts due the members of the Stock Exchanges, and then, had the rules of the Exchanges permitted, procured his admission to the suspended memberships without a formal sale and purchase of the seats.

Suit by a bankrupt (or even possession by him) is protected only until intervention and claim by the assignee.

Cohen vs. *Mitchell*, 25 L. R. (Q. B.D.), 262.
Thatcher vs. *Rockwell*, 105 U. S., 467.
Hill vs. *Harding*, 131 U. S. ~~Mem.~~ Appx. C. C., 200.

Indeed, the title of a stranger voluntarily redeeming such seats would be better than Yerkes', for the former would be free from the objection fatal to Yerkes' claims that his trust relation to the estate forbade him from reaping an advantage at the expense of his creditors.

The theory of the Bankruptcy Law is that a debtor unable to pay his debts, shall, upon turning over to his creditors all his estate, with certain exemptions, be entitled to be discharged from further liability. Part of the price of his discharge is good faith on his part in permitting the creditors to obtain the value of his estate. Any action on his part tending to secure to himself an advantage at the expense of his creditors is looked upon with disfavor. As was observed by Chief Justice Wilmot in *Hewitt* vs. *Mantell*, 2 Wilson 372, "the Statutes of Bankruptcy form one body or system of laws made for the benefit of creditors and every act done by a bankrupt for the benefit of his creditors, the Courts of law will liberally construe to be right and just, but contrary of acts done to the injury or disadvantage of creditors." After his discharge the bankrupt is entitled, with his subsequent earnings, to purchase property at assignees' sale. The discharge does not *per*

se reinvest him with any rights of property of which the bankruptcy has divested him.

Rutherford vs. *Dennis*, 59 How. Pr., 231.

Rea vs. *Richards*, 56 Ala., 266.

Oliver vs. *Sanborn*, 60 Mich., 346.

"He was not by his discharge discharged as a party from this court." Hughes, J., *in re Anderson*, 6 N. B. R. p. 363.

Good faith forbids him from taking advantage of his special knowledge of its value to procure property belonging to his creditors, excepting at a fair sale by the assignees or the latter's unmistaken disclaimer of title. In the settlement of a bankrupt's estate the assignees are necessarily obliged, in many cases, to rely almost entirely upon the procuring of information from the bankrupt; and the bankrupt law recognizes the duty of the bankrupt as to this assistance, and compels it when it is withheld.

The provisions of the Bankrupt Act of 1867 all show the bankrupt to be charged with the duty of disclosure and delivery of his property to the assignees.

Sec. 5110 provides that he cannot be discharged, "if he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition, or institution of proceedings * * * or, if he has concealed any part of his estate or effects or any books or writings relating thereto." Sec. 5083 provides that "the Court may, on the application of the assignee or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath on all matters relating to the *disposition or custody of his property*, * * * and to all matters concerning his property and estate and the due settlement thereof according to law * * * "

Under this section in *In Re Heath*, 7 N. B. R. 448, Blatchford, J., says:

"I do not think the fact that the bankrupt has been discharged is a good objection against his being examined at all under the order in question."

Sec. 5089 provides for the production of a bankrupt by his jailer for examination ; and when absent or disabled it is to be taken under the Court's direction. Under Sec. 5132 indictment can be found against any bankrupt who secretes or conceals his property * * * * or causes to be removed any such property or deed book * * * out of the district with intent to prevent it coming into the *possession* of the assignee in bankruptcy, or to hinder or delay him in securing or recovering the same. In *Means* vs. *Dowd*, 128 U. S., 273, it is held that the assignee may bring suit to set aside an assignment which, though not declared void by the provisions of the bankrupt law, has been made with intent to hinder and delay creditors. Mr. Justice Miller says :

" * * * * Any instrument which reserves to the assignor an interest in or an unlimited control over the property conveyed, and which has the effect of hindering or delaying creditors, is void as in fraud of those creditors."

And in *Peters* vs. *Bain*, 133 U. S., 670 to 672, Mr. Chief Justice Fuller says :

"The Statute of Elizabeth, C. 5 , against fraudulent conveyances, has been universally adopted in American law as the basis of our jurisdiction on that subject."

Sec. 5051 provides "that the debtor shall * * at the request of the assignee and at the expense of the estate, make and execute any instrument, deeds, and writings which may be proper to enable the assignee *to possess himself* fully of all the assets of the bankrupt." This provision is without any limitation of time.

A principle applies similar to that which forbids a technical trustee purchasing at his own sale, or those having confidential relations in respect to property from reaping an advantage in dealing with it.

The rule which discountenances such transactions rests on the moral obligation to refrain from placing one's self in relations which, ordinarily, excite a conflict between self interest and integrity.

It restrains all agents, public and private, and all persons who by their connection with, or concern in the affairs of others have acquired a knowledge not possessed by those whom they represent or for whom they are trustees.

Michoud vs. *Girod*, 4 How., 503, 555.

A party will not be permitted to purchase property, and hold it for his own benefit, when he has a *duty* to perform in relation to it which is inconsistent with his character as a purchaser on his own account.

Van Epps vs. *Van Epps*, 9 Paige Ch., 237.

Ringo vs. *Binns*, 10 Pet., 269.

One who without authority assumes the management of property in which others are beneficially interested becomes in equity a trustee by construction for their benefit; and during the continuance of such management is subject to the same rules and remedies as other constructive trustees.

Bennett vs. *Austin*, 81 N. Y., 308.

And when property is held by transfer from the bankrupt as against the assignee in bankruptcy in violation of the bankrupt act the transferree even is properly to be regarded as a trustee for the assignee and is accountable as such.

Schrenkeisen vs. *Miller*, 9 Ben., D. C. R. 55.

And, aside from the considerations which make Yerkes' acts in dealing with these seats the acts of a trustee or agent for the assignees, and forbid him acquiring the property for himself, it is clear from the statute that after an assignment to the assignee the bankrupt is powerless to redeem for himself.

Hampton vs. *Rouse*, 22 Wall 263.

Here, under a statute of Mississippi which permitted the owner of lands sold for taxes to redeem within a certain period, it was held, *inter alia*, that the Bankruptcy Act of 1867 made the assignee owner, and forbade the exercise by the bankrupt of an owner's right to redeem after the assignment has been delivered.

Under the Act of 1841, in *Pillow* vs. *Langtree* 5 Hump., (Tenn.) 389 it was held that "the decree in bankruptcy vests all the bankrupts equities of redemption in the assignee," and denied such right to a judgment creditor even in his own interest.

The redemption of the seats in controversy differs from the redemption of land under the statute considered in that case, in no particular excepting that the right of redemption in this case is contractual, while in that it was statutory.

The action of the bankrupt in seeking to possess himself of the property in these seats assumed the existence of some right to them remaining in him after the assignment to the assignees. But it is very clear that he had no possible claim upon it or right to deal with it. A bankrupt debtor after assignment has only a right to the surplus, or rather a hope or expectation of such right after the debts are paid.

Ex-parte Sheffield, L. R., 10 C. H., Div. 434.

Bartlett vs. *Teah*, 1 Fed., Rep., 770.

As, also, is this so in the case of a deed of trust for the benefit of creditors, conveying to the trustees the legal and equitable estate of the grantor.

Pettit vs. *Johnson*, 15 Ark. 55.

And where the debts remain unpaid to a large extent, and the trust for which the property is held by the assignees remains partly unexecuted, it is pure intermeddling for the bankrupt to deal with the property as if he had an interest in it.

Saunders vs. *Mitchell*, 61, Miss., 321

In Re Anderson, 9 N. B. R., 360.

In *Robertson* vs. *Denny*, 57 Ala., 492, it was held that the heirs of a bankrupt could not maintain an action to recover land which belonged to him at the time of his bankruptcy, although it was shown that the bankrupt's creditors and his assignee had been paid, or legally satisfied, the Court saying: "It is, doubtless, true that if, after

payment of the debts, which may be proved against the estate of the bankrupt, a surplus remains in the hands of the assignee, he holds it in trust for the bankrupt; and that on a proper application to the Court in bankruptcy, payment or transfer of it will be decreed."

It is insisted, therefore, that with the plain letter of the statute vesting title in the assignees, with the duty devolving upon the bankrupt of permitting the assignees to realize for his creditors everything possible out of the estate assigned to them, and with no plain and unmistakable refusal by them to appropriate these specific properties, this bankrupt was not entitled either at law or in equity to redeem the seats in question and hold them and their emoluments against the assignees.

And an assignee is not merely the successor in interest of the bankrupt. He stands in the position of a judgment creditor, not a judgment debtor.

Lloyd vs. *Hoo Sue*, 5 Sawy. Ct. K., 74.

"The statute is full of authority to him," (the assignee) "to sue for and recover property, property rights, and credits where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound. All of this, of course, is in the interest of the creditors of the bankrupt." Mr. Justice Miller in *Sawyer* vs. *Hoag*, 17 Wall, 620.

The burden of *disproving* a "trust relation" by Yerkes to his assignees and creditors as *cestuis que trustent* in securing and holding the stockboard seats is upon Yerkes.

Reichoff vs. *Brecht*, 51 Iowa, 633.

Zeller vs. *Echert*, 4 How., 289.

Villa vs. *Roderiguez*, 12 Wall, 323.

II.

The position of the apellees.

The various arguments for the bankrupt that found favor with the Master and the Court will now be considered.

It was said :

(1.) That the property redeemed and claimed by the bankrupt was not the same property as that which passed to the assignees in bankruptcy.

(2.) That the assignees abandoned their title.

(3.) That they were guilty of laches in asserting it.

First. *As to the property redeemed and claimed by the bankrupt not being the same property as that which passed to the assignees in bankruptcy.*

The ingenuity of the learned gentleman to whom the case was referred, first in his capacity as Register in Bankruptcy and then as Master, brought forth the novel view that a reinstated membership in a Stock Exchange, such as Yerkes claimed, was a different thing from the suspended membership which passed to the assignees, and that therefore, the former was legitimate after acquired property which passed to Yerkes, and which he could hold against the assignees. This view was an incidental or additional reason given by the Register to sustain his conclusions. (Rec., p. 50, fol. 92.)

But it apparently formed the chief ground for his opinion as Master (Rec., p. 18, fol. 43.) And the Court, in expressing itself satisfied with the Register's report, practically adopted his view. (Rec., p. 53, fol. 99.)

The position is unsound because there is nothing in the nature of a Stock Exchange seat which justifies it. The fact that the privileges of the seat are suspended upon insolvency, does not abolish the property in the seat. It does not become annihilated ; it does not go to the Exchadge or to the other members. The seat retains its identity, and upon the continuance of the insolvency is sold under the rules as a distinct thing, and the purchaser takes that particular property, and, when elected, exercises the privileges accompanying it.

The Master assumed that its character was given to it by the incident of an election or re-election or restoration to membership being necessary in order to give the pos-

TO BE READ IN BRIEF OF ARGUMENT IN THE CASES OF SPARHAWK, *ET AL.*, *vs.* YERKES, *ET AL.*, IMMEDIATELY BEFORE THE SENTENCE: "THE POSITION IS UNSOUND,* * * *" ON p 18.

The Master says: "On the whole, the Master is of opinion that there is no essential connection (quoad the rights of the plaintiffs) between the memberships at the time of the bankruptcy and those to which Mr. Yerkes was subsequently admitted. The latter constituted after-acquired property."

There was *absolutely no evidence to warrant the assumption by the Master reporting as register* that the assignees took only a "suspended membership;" that is, that the memberships were suspended before the rights of the assignees attached thereto. Mr. Johnson, Secretary and Treasurer of the Philadelphia Exchange says: "Charles T. Yerkes, Jr., was suspended for insolvency in 1871." (Rec. p. 39, fol. 72.)

The rights of the assignees attached under the assignment—in—bankruptcy (proper) as of the date of the filing of the petition in bankruptcy on November 10, 1871; and under the order of the Bankruptcy Court of February 8, 1872, and the assignment of Joseph M. Pyle, Esq., to the assignees in bankruptcy, in accordance therewith, their rights attached as of the date of Yerkes' assignment to him in trust for the benefit of creditors on October 24, 1871, *at which time the insolvency of Yerkes presumably arose.* (See agreement.)

Under the rules of the Philadelphia Board, no suspension was "worked" until notice or information from the member of his failure "to comply with his contracts" or of his "insolvency," to the "president or chairman" of the Exchange. And in case of the "neglect of the insolvent to make such report," report is required from "any member having knowledge of the fact" to the "governing com-

mittee or to the President or Chairman," and as well the appointment and report of a committee in that case, with right of appeal for seven days after which time only is the member "held to be suspended." (Rec. Sec. 1, Art. 12; p. 36; fol. 68.)

And under the rules of the New York Exchange while it is provided that "any member who fails to comply with his contract or who becomes insolvent shall be suspended until he has settled with his creditors;" yet this does not *ipso facto* work a suspension although it causes a liability to formal suspension. The information to the President (in writing) by the "member" and the performance of the "duty" imposed "on the presiding officer to *thereupon* give notice from the Chair of the suspension of such member" are still conditions *prerequisite to a formal and actual suspension.* (Rec. Sec. 1, Art. 14, p. 38; fol. 71.)

The performance of these conditions was not shown by the defendant Yerkes; and if such formal suspension had antedated the filing of the petition in bankruptcy and his assignment to Mr. Pyle this would doubtless have been shown. *It is submitted that no presumption arises in his favor as to these facts.*

sessor of the thing all the privileges attaching to it. Instead of this being the fact, its character is given to it by its position as property, and the rules of the organization as to election to membership are strictly subsidiary. The Master's view makes a seat in the Stock Exchange identical in kind with a membership in a social club with the personal privileges accompanying it. Suspension of the member in such a case is extermination of the membership. The true view is something very different. "The controlling feature appurtenant to a seat in the Stock Exchange," said the Court in *Grocers' Bank vs. Murphy*, 60 How. Pr., 426, "is that it may be bought and sold subject to the rules of the association, and in case of the owner's death a sale is made by the Exchange and the proceeds distributed. Herein exists the difference between it and membership in a social club. The latter can neither be bought nor sold."

If the Master's position were correct that the seat, as to its essential incidents, was a right existing *ex mera gratia*, and that the reinstatement and readmission to a membership must, as a matter of law, be made within the times prescribed by the rules or be lost, there would be annihilation of a membership in the event of its owner failing to claim it. But that this is not the case is shown by the rules, which provide for its sale, and payment to the owner of the balance of the proceeds after debts to members are paid. (Rec. 36, fol. 67.)

Suppose, in the present case, neither the assignees nor Yerkes had claimed the seats in question, and that they had not been sold under the rules, as they were not, would it seriously be argued, because of the existence of the rules which entitle to readmission only within a limited time from the insolvency, that the value of the property was to disappear, or that the assignees in whom it became vested by statute were not entitled to it?

If the thing is not to pass out of existence the right to its benefits must exist in somebody. If, without a disclaimer

of title by the assignees the bankrupt could, without a sale, step in and take the property upon paying the charges on it, that could likewise be done, it would seem, by a volunteering stranger, who in the eye of the law has as much interest in the property vested in the assignee by the assignment as the bankrupt himself, so long, at least, as all the debts proved against his estate are unpaid.

But it would not be argued that a stranger having no claim of title adverse to the bankrupt before the bankruptcy could gain a title against the assignees after the bankruptcy, excepting by purchase from the assignees, or from the Stock Exchange which had authority to sell.

This right to readmission to the privileges of a Stock Exchange seat is very analagous to the right of renewal of a lease. It is held that this right is an essential part of the property of an expiring lease, and an assignee for creditors cannot be deprived of it by the bankrupt, or the bankrupt's vendee, procuring a new lease in his own name after bankruptcy.

Jones vs. *Slawson*, 33 Fed. Rep., 632.

Even where there is no covenant to renew, but merely an expectancy of renewal based upon occupancy of the premises, and where actual renewal depends upon the favor of the lessor, the property in the new lease attaches to the old lease and belongs to the owner of the latter.

Ibid.

Phyfe vs. *Wardell*, 5 Paige Ch., 268.

Gibbes vs. *Jenkins*, 3 Sandf. Ch., 134.

Mitchell vs. *Reed*, 84 N. Y., 562.

The Master's conception of a membership obtained by readmission as distinct from a suspended membership, is purely of an academic and metaphysical character. It finds no basis in the facts proven, or the law governing, as to the nature of a Stock Exchange seat. It was evidently suggested by way of argument to sustain the remaining and principal grounds upon which the cases were determined.

Second. *As to the assignees' abandonment of their title.*

It is well understood to be the law that assignees in bankruptcy are not bound to accept property of an onerous or unprofitable character.

American File Company vs. *Garret*, 110 U. S., 288, 295.

The Master and the Court were too quick to assume, notwithstanding the evidence, that the present were proper cases for applying this law, and for holding that the assignees had, as matter of fact, abandoned this property, and had therefore no further claim upon it.

Said the Supreme Court of Pennsylvania in *Reynolds* vs. *Cridge*, 131 Pa. St. 189, 194: "That an executor may abandon property pledged, or subject to assessment, if there is no value over the debt or the assessment to be preserved for the estate, was ruled by Chief Justice Shaw in *Ripley* vs. *Sampson*, 10 Pick, 373. *Such result or intention will not be lightly inferred.*"

But there was the lightest sort of an inference of abandonment in the present cases. The only undoubted fact established, which, it was in effect assumed, indicated abandonment, was the inaction of the assignees in endeavoring to realize upon the seats in the exchanges. It is in other words, charged that they abandoned their pledge by leaving it in the hands of the pledgee.

But it is settled law (*Reynolds* vs. *Cridge*) that merely leaving a pledge in the hands of a pledgee with no offer to redeem, but also with no demand by the creditor for payment, is not of itself abandonment, and is not even evidence sufficient to justify submitting the question of abandonment to a jury.

The Master found, but without evidence to support the finding, that the assignees declined to pay any of the charges incident to the continuance of the memberships. There is no evidence whatever in the Records, that payment of any of the charges incident to the continuance of either of the memberships was ever demanded of the assignees by the Stock Exchange authorities. It was dis-

tinctly testified, however, that upon one occasion when demand for payment of dues was made *on Yerkes*, he called the fact to the attention of the assignees. Instead of declining to pay it, they said to Yerkes that "as the claim had been made upon him * * * * he would be the proper party to pay it," but that he would be reimbursed for payments of that kind from what might be realized out of the seats in the boards (p. 31, fol. 61).

So far from their refusing to pay these charges, although none had been demanded of them, the assignees here distinctly obligated the assigned estate to repay out of the value of the seats when realized upon, the moneys that might be expended in saving them till they could be advantageously sold. And the subsequent testimony shows that the assignees, acting upon their belief that Yerkes was preserving the memberships, in accordance with their own suggestion, by making payments of dues and charges from time to time as required, felt relieved of the necessity of themselves attending to payments in order to prevent adverse sales of the seats.

Mr. Duffield testifies, p. 33:

"The prevention of the sale on the claims of creditors in the stock board was not considered a necessity by reason of the fact that it was understood Mr. Yerkes wished to retain in the boards his seats, *and he himself, it was known, was preventing, by his own exertion, any sale of these seats by the creditors in the boards, because he had informed us of that. We had talked it over.*"

The evidence of the assignees' assertion of title, and of their insistence to Yerkes upon their claim to the seats, is full and positive. Mr. Sparhawk testified that in interviews between the assignees and the bankrupt he (Sparhawk) "never admitted, expressly or tacitly, that there was nothing in the seats, * * * but on the contrary always claimed that they were assets of the estate, that it was our duty to follow and claim as property, and I always denied that it was a mere personal privilege and not an asset, and such, so far as I can remember, was the uniform and always declaration of Mr. Gross and Mr. Duffield on every occasion when the matter was the subject of conversation between ourselves and with him."

Duffield's testimony is to the same effect. (Rec. 55-56, fols. 105-107.)

It is not easy to find in the record proof of abandonment of these seats by the assignees, so far as their right and title to them as against Yerkes was concerned. Even after the decision in *Hyde* vs. *Woods* in October, 1876, that the claims of stock board creditors when paid out of the proceeds of the sale of a seat under the rules of the Board were not preferences under the bankruptcy act, which determined them not to proceed actively at that time to dispose of the seats (fol. 107), their claim was not yielded.

Nor was Yerkes misled or induced by their conduct or inaction to believe that they had abandoned their claim. He knew that the title had passed to them by the assignment, and his dealings with them put him on notice that their interest in the seats, as against him, was not yielded up. There is therefore no room for the contention that their conduct estops them from now, as always, asserting title to the seats.

The acceptance and appropriation of the pledge or property by the assignees by the continuous payment of dividends upon the Stock Exchange debts proved which were liens against the seats, and which payments went to the reduction of the incumbrances upon them, was of itself ample to indicate their claim of title.

Where the bankrupt was lessee of pasture land, and the assignee suffered the bankrupt's cows to remain on the land for two days and ordered them milked there, Lord Ellenborough was of the opinion that this was the adoption of the lease by the assignee.

Welsh vs. *Myers*, 4 Camp., 368.

In an action against an assignee for "mismanagement of a farm in carrying off straw and manure," intermeddling with farm leased to the bankrupt by giving orders to the workmen, was held evidence of an acceptance of the lease by the assignee, or, in other words, an election to take the farm under the lease.

Thomas vs. *Pemberton*, 7 Taunt., 206.

Where the assignee had the bankrupt carry on business on the premises from November 15, 1823, to the fore part of the following year (*although on 22 December, 1823, the assignee had declined the lease in a letter to the landlord*), it was held "that the assignee had *elected to accept* the lease on the premises for the benefit of creditors."

Clark vs. *Hume*, 1 Ry & Mood. 107.

The commencement of the payment of these dividends, about July 19, 1872, was within seven months of the date of the assignment to the assignees, and was more than fourteen months before Yerkes' discharge as a bankrupt, October 3, 1873. These payments must have been known to the bankrupt. They antedated, by a very considerable time, the commencement of Yerkes' payments to his creditors, and his rendering services to them, which, as to his New York creditors, were respectively made and rendered three or four years after his adjudication as a bankrupt on December 13, 1871, and, as to his Philadelphia creditors, long after his adjudication. The payments antedated by many years Yerkes' payments to his Philadelphia Board creditors, which he says were made about two years before his testimony was taken on May 3, 1884. The record shows his knowledge of the assignee's payments of dividends to the Stock Board creditors before his restoration to the Philadelphia Board. He had himself drawn the dividends for John B. Bouvier on his claim of February 3, 1880. (Rec. p. 54, fol. 102.)

The record also shows that the assignees did not know of the payments by Yerkes of money on account of their creditors ~~of~~ the New York Stock Board, or the rendering of services by him to them on account of the same. Of course the intimation of the control by Yerkes of the Bouvier claim can be put down as of the date of February 3, 1880, when Yerkes drew the dividend for Bouvier, but that did not convey any intimation of the character of the authority which Yerkes exercised over this claim. The record does not show it. Assignee Duffield testifies:

"When the Bouvier claim went into the control of Yerkes, we considered that that was one impediment out of our way of getting Yerkes' seat, and, as I have said, the payment of Drexel, Morgan & Co.'s debt by Yerkes was unknown to us, and we supposed that he had not been paid. This was my case anyhow, and it is an impediment that we supposed was in the case that has been removed." (Rec. p. 35, fol. 66.)

The payment by Yerkes of the Drexel, Morgan & Co. debt, and also that of John B. Bouvier, being by services rendered by Yerkes, the assignees could not be supposed to know the facts. No knowledge or information was shown to have been given to them by Yerkes of any services rendered Bouvier on his claim, and an intimation such as is shown by Yerkes' receipt for Bouvier for his dividends, while it would show very close and intimate relations between them, would not amount to information.

As to the Philadelphia Board seats, no information from Yerkes to the assignee of any payments to the stock board creditors is shown. Assignee Duffield testifies: "we had been informed that Yerkes was paying off the claims of the brokers here in Philadelphia at least." (Rec. p. 56, fol. 108). This testimony is referable only to the payments of Philadelphia Board creditors, which the bankrupt fixed at two years before his testimony of May 22, 1884, and the addition of the phrase in Duffield's testimony "probably New York" is not referable to t[he] payments for services rendered to Bouvier and Drexel, [Morgan] & Co. whatever the date of those services may hav[e been]. The assignees were not consulted by the bankrupt as to the making of these payments, or the rendering of these services, and the debt of Berdell, the other New York creditor, not having been proved they could not know anything about it.

After 20 years a presumption of abandonment would arise of course; but until that time elapses no such presumption arises.

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After 20 years a presumption of abandonment would arise of course; but until that time elapses no such presumption arises.

In *Union Canal Co.* vs. *Woodside*, 11 Pa. St., 176, although twenty-two years had elapsed from the finishing of the canal to the taking out of the venire, there was held a presumption to have arisen after twenty years which had been settled by the inquest in favor of the assignee. The Court say: "I think it would arise after so great a lapse of time; and the burden would have been thrown upon the plaintiff to rebut the presumption. It would have been for him to show that the damages had not been released or abandoned. A venire to assess damages against a Coal Co. is a suit at law within the meaning of section 8 of the Act of 1841. The limitation of that section is intended to prevent adverse claims of third persons from impeding the settlement of bankrupts' estates, and extends to cases only where there are such adverse interests."

The slightest evidence will rebut a presumption (1 Wharton, 229; 2 Watts, 215), and is not such evidence furnished here if such presumption arose, which it did not, in the payment of dividends, antedating besides any payment by the bankrupt to his creditors?

In *Hale* vs. *Christy*, 40 N. W. R. 295 (Neb.), judgment of revivor in the names of the assignees of the judgment in the Court below was reversed where in 1886 the bankrupt came and suggested that his judgment recovered in March 1871, against Hale had "become dormant from lapse of time," and that the same had been assigned to two of his minor children and that they were the owners thereof; and asking a revival of the judgment in their favor. The defendant in the judgment *inter alia* suggested the adjudication of bankruptcy in 1873, the appointment of the assignees, the non-settlement of the estate, that the assignee had not been discharged, and that the assets were insufficient to pay the debts. The refusal to affirm the judgment of revivor was based upon the fact of the same having vested in the assignee in bankruptcy and upon the authority of *Irwin* vs. *U. S.*, 97 U. S., 396, and *Glenny* vs. *Langdon*

98 U. S. 20, as affirmed in *Trimble* vs. *Woodhead*, 102 U. S., 647 and *Moyer* vs. *Dewey*, 103 U. S., 301.

And there is twenty years for mortgageor to redeem after forfeiture.

Amory vs. *Lawrence*, 3 Cliff., 523.

And in *Steevens* vs. *Earles*, 25 Mich., 40,(under the act of 1841) it was held that a presumption of abandonment arose after twenty years; and there having been a lapse of thirty years in that case, no debts proved against the bankrupt's estate, all provable debts outlawed, and all expenses paid. It was held that the trust had terminated.

For the purpose of any benefit to the bankrupt "clear proof of abandonment by the assignee and creditors" is requisite.

Mitchell, J. in *Saunders* vs. *Mitchell*, 61 Miss., 327.

The "election" by the assignee to charge the general estate with $2,263.29 with dividends paid to creditors in the New York Stock Board and $6,889.61 in dividends paid to creditors in the Philadelphia Stock Board, contradicts and prevents any presumption of abandonment and denies any "election not to claim" title to this property, apart from positive claim of title by them being shown.

Third. *As to the assignees being guilty of laches in asserting their title.*

It is not understood to be contended that this claim is barred by the provision in the Bankrupt Act for a two years' limitation of suits. (Rev. Stat. 5057.) Lest, however, this contention should be made, it is proper to dispose of it at this point.

The Act declares that no suit, either at law or in equity, shall be maintainable in any Court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. This provision is a substantial re-enactment of the 8th section of the Bankrupt Act of

1841. It has been held, under these acts, that the limitation applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt, which came to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before assignment.

In re Frederick J. Conant, 5 Blatchf., 54.
Stevens vs. *Hauser*, 39 N. Y., 302.
Sedgwick vs. *Casey*, 4 N. B. R., 496.

"The interest adversely claimed, and which the statute protects, if not sued for within two years, is an interest in a claimant other than the bankrupt."

Clark vs. *Clark*, 17 How., 315, 321.
Phelps vs. *McDonald*, 99 U. S., 298, 306.
French vs. *Merrill*, 132 Mass., 525.
Minot vs. *Tappan*, 137 Mass., 333.

In such cases as *Leech* vs. *Dawson*, 23 Fed. Rep. 654, which appears to express a view contrary to this, it will be found the contests were not between the assignee and the bankrupt, but between the assignee and purchasers from the bankrupt or other persons claiming adversely.

And such cases as *Streeter* vs. *Sumner*, 11 Foster 542 (N. H.), where the contract required the boarding of defendant's lumbermen and the keep of his teams, it will be seen are decided upon the ground that "contracts continuing after the bankruptcy and depending upon the personal services of the bankrupt do not pass to the assignee."

But even if Yerkes be deemed, for any purpose, a claimant to an adverse interest within the statute, his adverse interest did not begin till 1883. He was not admitted to the New York Stock Exchange till December 27, 1883, and to the Philadelphia Stock Exchange till June 18, 1883. (Rec. I. p. 18, fol. 43). From these dates and not before, the adverse interest, if it existed at all, began. Under the Act of 1841 it was held that the limitation does not run till the taking of *adverse* possession.

Banks vs. *Ogden*, 2 Wall, 57.

And the same doctrine has been maintained in interpreting the Act of 1867 and other Acts of the kind.

Bennett vs. *Biddle*, 27 W. N. C., 522. [Pa. Sup. Ct.]

Beson vs. *Shively*, 28 Kan., 574.

Gray vs. *Jones*, 14 Fed. Rep., 83.

The assignees filed their petition in the bankruptcy court for sale of these interests early in 1884. (Rec. pp. 42-43.) And, their petition being dismissed, they continued the claim by bill filed in the Circuit Court, November 19, 1885. (Rec. I, fol. 10; Rec. II; fol. 14.) The present suits, for purposes of the limitation of the statute are to be deemed a continuance of the proceedings begun in the bankruptcy court.

Marshall vs. *Knox*, 16 Wall., 557.

Adams vs. *Collier*, 122 U. S., 382, 389.

There is, therefore, no bar. And even if advantage cannot be taken of the time of beginning the proceedings in the bankruptcy court, the bill filed in the New York Stock Exchange case was quite within the two years.

An action against an officer holding the proceeds of a sale of bankrupt's goods under an attachment made within four months of proceedings in bankruptcy which was begun within two years of demand and refusal, is not barred although not begun until 11 years after the attachment in consequence of the neglect of the assignee in not coming to the knowledge of existence of the attachment (*French* vs. *Merrill*, 132 Mass., 525) and where the adverse claim existed against the property when in the bankrupt's hands the statute commences to run against the assignee on his refusal to deliver on demand (*Esmond* vs. *Apgar*, 7 Daley, 379.) The two years limitation to stay proceedings on a fraudulent judgment do not begin to run until proceedings to establish the judgment (*Lehman* vs. *Le Farge*, 42 Fed. R. 493); and under the act of 1841 in was held that the foreclosure of a mortgage and the sale of the property in the suit to which the assignee was not a party does not constitute an *adverse claim* where it does not appear that the

purchaser claimed adversely to his own title acquired by such sale. *Price* vs. *Phillips*, 3 Robts., 448, (N. Y.) The fact of the mortgage being admittted, suit for the foreclosure of a mortgage is not the claim of an adverse interest, within the meaning of the statute. The suit of one person against another does not necessarily imply an adverse interest to such property. *Gildersleeve* vs. *Gaynor*, 15 Fed., 101. The right to an equity of redemption is not *inconsistant or adverse* to the rights of a mortgagee unless there is a disclaimer of the mortgage and an assertion of possession hostile to it. *Elsberry* vs. *Boykin*, 65 Ala., 342. The two years limitation does not apply to an action of partition. The suit is not brought to recover property in dispute as to which there was an adverse claim; but for the purpose of getting it into a situation where it will bring the largest sum to the estate. *Rutherford* vs. *Hewey*, 59 How Pr., 231. On a bill to restrain a sale by an assignee in bankruptcy, it was held that action did not accrue until defendant attempted sale. *West Portland H. A.* vs. *Lownsdale*, 17 Fed., p. 614.

But, without more, the obvious answer to any argument of the appellees' at this time based on the statute of limitations is that it was not pleaded or set up in the Court below, and therefore cannot be urged for the first time here.

Upton vs. *McLaughlin*, 105 U. S., 640.
Bartles vs. *Gibson*, 17 Fed., 293.
Stockton vs. *Frey*, 4 Gill., 420.

The only limitation to be seriously urged is doubtless the equitable one of the appellants' alleged laches. A few facts must be noted as bearing on this allegation of laches.

Yerkes, as observed above, was not re-admitted to the seats until December 27, 1883 and June 18, 1883. He stated in his testimony, taken May 23, 1884 (fol. 46), the settlements he made with members of the Philadelphia Stock Exchange were not made till "about two years

ago, and the readmission was made shortly afterward." His Philadelphia settlements were therefore made not earlier than May, 1882, and possibly as late as June 18, 1883. His few New York settlements were made several years prior (fol 50). The New York debts, amounting to $8,522.-99 (fol. 47), he paid in charges for services, excepting Berdell's small claim of $643,59, not proved, which, Yerkes says, was settled in cash (p. 22 fols. 49, 50).

In the case of *In re Rosenberg*, 3 N. B. R. *130*, where chattel mortgages made before bankruptcy were assigned after bankruptcy by the mortgagee, and the assignee in bankruptcy presented his petition to set aside the mortgage and obtain possession of the property, which was in the possession of the transferee of the mortgagee, although in the bankrupt at the commencement of the bankruptcy proceedings, Blatchford, J., said: "From the filing of the bankrupt's petition the property was in the custody of the Court and at least from the time of the appointment of the assignee, the possession of it by the bankrupt was in law the possession of it by the assignee. The taking of any of it under the mortgage was after that time unlawful, and the taking of it from the custody of the Court or of an officer thereof was a contempt of Court."

It was attempted on Yerkes' direct examination to show that during the whole period from 1871 to 1884 be held open and adverse possession of the seats [fol. 48].

He admitted, however, that he was not in possession till his formal readmission.

"I resumed my privilege to the floor (of the New York Stock Exchange,) which is merely what a member is suspended from when he fails, about a year ago—something less than a year ago. (Test. taken May, 1884, fol 50.)

Q. And from the time of your adjudication as a bankrupt until you made the settlement referred to, you did not use the membership in either of these boards, as I understand you?

A. I was never inside the Stock Exchange in either place; never did any business in either of the Stock Exchanges from the time of my suspension until my reinstatement. (fol. 51).

We have, thus, an open adverse possession by Yerkes of the seats in question from not earlier than December, 1883, and June 1883, and a proceeding brought against him in the bankruptcy court as early as March or April, 1884. Instead of there being laches here, there was, indeed, the

utmost diligence. *Caldwell* vs. *Davis*, 15 Pac. R. 696. (Colo).

The restoration to the membership without notice of the application for restoration, and without notice to the assignees of such restoration and the holding of the board seats against them constitute fraud on the "unsecured creditors whose representatives the assignees especially are," as is said in re Bennett, 2 Hughes, 156.

Delay will not purge a fraud and only from its discovery when concealed (or secret) does the statute of limitations begin to run. *Martin, assignee* vs. *Smith*, 4 N. B. R., 275. In this case Dilion, J., quoting from Curtis, J., in *Carr* vs. *Hilton*, 1 Curt. Ct. Ct. R. 230, says:

"Statutes of limitation do not run against a fraud while it is a secret. It is objected that the bill does not contain any averment that the fraud was fraudulently concealed, but it does state a case of secret fraud, and it would be difficult to distinguish this from fraudulent concealment."

"Fraud . . . . is rarely perpetrated openly and in broad daylight. It is committed in secret and privately, and is usually shrouded in mystery and hemmed in and surrounded by all the guards which can be invoked to protect from discovery and exposure. Its operations are invariably circuitous and difficult of detection."

Wait on Fraud. Conv., p. 10.

Newman vs. *Cordell*, 43 Barb. 448-461.

"A jury has a right to infer fraud from slight circumstances, from its subtle nature."

Adams vs. *Shiffer*, 11 Colo., 15.

"Where a party has a right to expect full communication, concealment is a fraud."

Pollain vs. *Pollain*, 76 Ga., 420.

"And suppression of a material fact is equivalent to false representation."

Stewart vs. *Cattle Ranch Co.*, 128 U. S., 383.

Until the restoration was established there was no fraud in fact, although what went before became after that fact *indicia* of fraud, and at the time of their occurrence suspicious circumstances.

"Circumstances calculated to excite suspicion are not sufficient to establish fraud."

Phelps vs. *Elliott*, 35 Fed. R., 455.

Any suspicion of improper design upon these seats on the part of Yerkes would not necessitate any action on the part of the assignees until the discovery of his restoration to memberships.

Tuteur vs. *Chase*, 6 So. Rep. 241 (Miss).

There could be no constructive notice of restoration until discovered.

Parker vs. *Kane*, 4 Wis., 1.

The burden is on the defendant to show laches in the assignees in not making discovery of the fraud.

Tyler vs. *Angevine*, 15 Blatch., C. C. R., p. 536.

The Master and the Court rested their conclusions upon the theory that the assignees had slumbered on their rights for twelve years.

It is sufficient to say, in answer to this view, that if these actions were really against the two Stock Exchanges the members of which are here joined as formal defendants, and these Exchanges or their members were here claiming adverse title to the seats as against these appellants, alleging a prior claim of right and a ripening of title in them because of the appellants' failure to proceed against them for twelve years, there might be some force in the claim of laches.

But Yerkes is here as the only adverse claimant to these seats. And in such litigations as these the Stock Exchanges are not even necessary parties.

Londheim vs. *White*, 67 How. Pr. 467.

Yerkes' adverse interest and possession began in 1883. He then, for the first time, obtained title inconsistent with that of the assignees. How can *he* assert laches? Laches is a defence available by one in possession of the thing claimed and is assertable only from the time of possession, at which time title begins to ripen.

Bush vs. *Stanley*, 122 Ill., 406.

Laches was found just as if Yerkes' rights dated from the assignment in bankruptcy, and as if the assignees' duty *qua* his present claims required enforcement of their rights then. Both the Master and the Court overlooked the proof that the assignees, in their interviews with Yerkes, always insisted upon their claims, the testimony tending to show that Yerkes acted for the assignees in saving the seats by paying the charges against them, and that only when Yerkes came out as an admittedly hostile claimant to the seats by virtue of his readmission to the privileges of membership, were they thoroughly aware that their rights in the premises were imperilled.

Mere lapse of time, however great, will not bar a recovery if an excuse therefor be given which takes hold of the conscience of a chancellor, and is such as renders it inequitable that the bar should be imposed.

Harris vs. *McIntyre*, 8 N. E. R., 182 (Ill).

The evidence shows the original low value of these stock board seats, and their subsequently increasing value, which did not reach the highest figures in the case of the New York seat until just before the filing of the bill; and in the case of the Philadelphia seat the bill states the fact of recent sales at from $5,000 to $8,000, while $5,000 and $4,000 are the prices stated by the secretary of the board to have been obtained in 1884. The time and attention of the assignees were monopolized by the current business of the estate, and as it was supposed there was no injury to the rights of creditors arising from this delay (testimony of Assignee Duffield, p. 57, fol. 109) it was not deemed necessary to take any proceedings until they learned of the attempted restoration of Yerkes to the memberships.

As is said by Mr. Justice Field in *Erwin* vs. *U. S.*, 97, U. S., on p. 396: "Contingencies may arise in many ways which will give value" to a claim or a property right; and the case decides that when those contingencies have arisen, no right is thereby given the bankrupt, and, certainly, the assignees' right in this case is not lessened

because of the property not having been sold for a low price. There the bankrupt claimed to hold as a purchaser from his assignee, which was not sustained because of no intent to sell on the part of the assignee.

In our cases of course there was no intent to sell, and much less an intent to give or bestow upon the bankrupt what proves to be valuable property with a premium added for the taking as a gift in the shape of large dividends to secured creditors.

The bankrupt in resisting the assignees' claim in this case practically assumes that they were bound as against him to realize at once or within the period of the statute, upon the property in these seats that passed to them. This is not the law. They were not obliged to sell until they considered it for the best interests of the general creditors. Said this Court in *Banks* vs. *Ogden* at p, 70: "We are not satisfied that the limitation in the Eighth Section (Act of 1841) can be applied to sales of real estate." In *Holbrook* vs. *Brenner*, 31, Ill., 513, 514, which was ejectment between persons claiming under the assignee in bankruptcy, the Supreme Court of Illinois says in construeing the statutory limitation for bringing suits: "These provisions relate to the bringing of suits" to recover assets. "It in no wise relates to the sale of property. There does not seem to be the remotest connection between maintaining a suit and selling property. The property is vested in him (the assignee) for the benefit of creditors, and it cannot be that it was designed, that if from any cause it was not sold, they, without fault or neglect on their part, should be deprived of their beneficial interest in the trust fund."

In *Mount* vs. *Manhattan Co.*, 43 N. J. Eq., 25, where the administrator of a bankrupt brought suit to recover the proceeds of a sale of mortgaged property over and above the amount due on the mortgage at the time of the sale, the Vice Chancellor said: "the fact that the assignee has not utilized such right" (realized the money value) "within the time limited by the Bankrupt Law, gives neither the bankrupt nor his creditors any right whatever to them."

The bankrupt was repelled and estopped by the assignment from claiming in his own right; however, the rights of third parties might be affected by the assignment.

Deadrich vs. *Armour*, 10 Humph., 598.

Atwood vs. *Thomas*, 60 Miss., 162.

In this aspect it is plain that Yerkes is not in position to defend against these appellants on the ground of laches.

But in any event this claim has been asserted within the statutory period, and Yerkes is therefore without status to question it.

In *Insurance Company* vs. *Eldridge*, 102 U. S., 545, a deed of trust of lands conveyed to secure a promissory note was released by the trustee without the surrender or payment of the note, or the express authority of the holder thereof, and a purchaser bought subsequently without notice of these facts. This Court held that the purchaser could not defend on the ground of laches in a suit by the holder of the note to set aside the second deed as in fraud of his rights. Said Mr. Justice Field, p. 548: "The Company (the purchaser) * * * must be deemed to have known of the want of power in the trustee to release the property from the Coburn deed, and it does not lie in its mouth to object that the complainant did not sooner seek to set aside the priority of lien thus gained; nor can it aver that his claim to have the instrument cancelled, by which this priority was secured, is a stale one, when asserted within the period allowed by law and no rights of third parties as *bona fide* purchasers have intervened to render inequitable the assertion of his original lien." This is saying in effect that a purchaser with notice of an outstanding claim cannot interpose laches as a defense to the claim as long as the statute of limitations, *running from the time he acquired title*, cannot be successfully pleaded.

See also *Banking Company* vs. *Maddever*, L. R. 27, Ch. Div. 532.

Montgomery vs. *Cloud*, 3 S. E. R. 196. (S. C.)

Is not this the position in which Yerkes is as to the claim of these appellants? He knew that their claim existed. With this knowledge he attempted, by rendering services, and the use of some money, to buy back his seats, and finally got himself reinstated in the Exchanges. If there is no statutory bar with the statute running from December and June, 1883, there is no laches in these appellants in their suit against him.

And if the position be correct that the bankrupt, by reason of his relations to the estate and his dealings with the assignees, was their trustee, there is an additional reason why time should run only from 1883, and why, therefore, there should be no equitable bar. For, as was observed by Mr. Justice Story in *Oliver* vs. *Piatt*, 3 How., 333, 411: "the mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust, and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que* trust." It is very evident that the first overt act by Yerkes clearly indicating to the assignees that his position was adverse to their claims was his procurement of his own readmission to the Exchanges. Before this step was taken he had not even a colorable status to resist the claims the assignments in bankruptcy gave the assignee.

There is nothing in the Records to show that Yerkes ever rendered any account to the assignees of these payments of dues, assessments and charges, or demanded their repayment to him; and it is submitted that he cannot hold these seats adversely to them without such account and demand.

Taylor vs. *Young*, 22 N. W. R., 799 (Mich.)

Com. Life Ins. Co. vs. *Perry*, 22 N.W.R., p. 937, (Iowa.)

Even though the money was not furnished by the assignees to pay dues, charges and assessments.

Bowman vs. *Officer*, 6 N. W. R., 28 (Iowa.)

Considerable attention is given by Yerkes in his testimony,

to emphasizing the fact that his own personal exertions preserved the seats from sale, and that his own personal moneys, earned after his discharge, redeemed them. It is not seen that these facts militate against the equitable and legal rights of the complainants. In preserving the seats he preserved them for those who were entitled to them.

Connor vs. *Merchants Express Co.*, 42 Ga., 37.

Guinness vs. *Carroll*, 1 Barn. and Ad. 459.

And the most that could possibly be claimed for him, is that he might be entitled to be reimbursed for some of his outlays from the fund realized upon the sales of the respective seats as prayed in the bills.

IV.

THE APPELLANTS ARE AT LEAST ENTITLED TO BE SUBROGATED TO THE RIGHTS OF THE STOCK EXCHANGE CREDITORS AS AGAINST THESE SEATS TO THE EXTENT OF THE DIVIDENDS RECEIVED BY THESE SECURED CREDITORS FROM THE BANKRUPT'S ESTATE.

The assignees were and are trustees for all creditors. The case made by the Record is that one class of creditors with special liens upon certain property sufficient in value at the time of Yerkes' restoration in the case of the New York seat to more than pay their claims in full, and sufficient in value at the time of filing the bill to very much more than do so, received dividends out of the general estate to the amount of twenty-eight per cent. of their claims, the Philadelphia Stock Board creditors receiving the same per cent., an amount approximating to one-third of their claims against Yerkes. The general creditors are equitably entitled to be reimbursed at least the amount so received. And the lien held by the Stock Exchange members should be preserved to this amount.

Drexel, Morgan & Co. and John B. Bouvier, of the New York Board, with claims aggregating $7,879.40, proved for the full amount, and received from the assigned estate about $2,206.23 (fols. 47, 51).

And the creditors in the Philadelphia Exchange proved in $24,491.93, upon which was paid about $6,889.61.

Yerkes' "understanding" does not matter, as it is always easy for a man to understand that to be which he wishes to be.

In *Waldron* vs. *Babbitt*, 16 Wall. on p. 581, which was the case of a sale by a retail country merchant of his entire stock, Mr. Justice Davis says: "Summerfield seeks to overthrow the legal presumption that Mendelssohn intended to commit a fraud upon his creditors by showing that he paid full value for goods, in ignorance of the condition of Mendelssohn's affairs. But the law will not let him escape in that way; the question raised by the statute is not his actual belief, but what he had actual cause to believe." Yerkes, in acquiring possession of valuable property, as against his unsecured creditors, is in no better position than if he were in the position of Mendelssohn in that case, and had received the value of these seats from a third party. If a third party is to be presumed guilty of a fraud, how much more is the bankrupt himself guilty of such fraud in securing his creditors' property, even though he does it with an outlay of money? As there may be conspiracy without fraud, so there may be fraud without conspiracy, and that fraud is none the less because there is or because there is not a third party taken into it.

There was evidently a design in Yerkes to recoup, through the value of the New York seat, any excess over the value of the Philadelphia seat in the amounts which he paid to Philadelphia Stock Board creditors.

The right of subrogation is not doubtful.

"A lien creditor proving his claim as unsecured does not extinguish his lien, but waives it *for the assignee's benefit as subrogatee.*"

Starks vs. *Curd*, 88 Ky., 164.

Cook vs. *Farrington*, 104 Mass., 212, 213.

Hiscock vs. *Jaycox*, 12 N. B. R., 507, 512.

The Bankruptcy Act of 1867 (Rev. Stat., Sec. 5075),

substantially reinacting Sections 20 and 21 of the Act of 1841, provides:

"When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

In construing this provision, in connection with the lien of a judgment, it has been decided that where a creditor having a judgment against a bankrupt which is a lien upon his real estate, proves his debt in bankruptcy and comes in upon the bankrupt's estate for the whole debt, the assignee in bankruptcy is entitled to be subrogated to the rights of the judgment creditor as regards his lien upon the real estate.

Wallace vs. *Conrad*, 7 Phila., 114.

The language of the Court in this case (District Court of Philadelphia) is so conclusive that it may be quoted at length:

"When she elected to prove her whole debt in bankruptcy, and to come in upon the bankrupt's estate for it, she thereby surrendered her judgment for the use of the assignee, who is entitled to be subrogated to the lien which she had. This is the fair and necessary inference from the language of the twentieth section, which provides that when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, *or the creditor may release or convey his claim to the assignee upon such prop-*

erty, and be admitted to prove his whole debt." And by the twenty-first section it is provided, that "no creditor proving his debt or claim shall be allowed to * * maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt; and all proceedings already commenced or unsatisfied judgments obtained thereon shall be deemed to be discharged and surrendered thereby." It is objected that if the Goehman judgment was discharged by proving the debt in bankruptcy, it is impossible that it should be in force for the benefit of the assignee in bankruptcy, or for any purpose. But this objection is more nice than sound. The language of the Act is "discharged and surrendered" and reading it in connection with the provision of the twentieth section, which requires the creditor "to release or convey his claim to the assignee" as a preliminary condition to his being admitted to prove his whole debt, it is impossible, we think, to avoid the conclusion that the meaning of the language used in this twenty-first section, is that the unsatisfied judgment is to be discharged as to the creditor proving his debt and surrendered to the assignee for the benefit of the other creditors. This interpretation is not only the natural one, and consistent with the language of the Act, but is the only one in harmony with the general scope and tenor of the various provisions relating to this subject. It is clear that the assignee might have demanded as a preliminary to the proof of the Goehman debt the conveyance of the judgment to him for the benefit of the creditors. In such a case, *that shall be considered as having been done which ought to have been done, for it would be contrary to the plainest equity if the creditor representing the Goehman judgment should be allowed to come in upon the bankrupt's estate for his whole claim to the detriment of the general creditors, and at the same time they should not be subrogated to her rights under the judgment and entitled to the protection of its priority* over the subsequent judgments."

The law is uniform as to this right of subrogation whether the lien to which the assignee claims subrogation is against realty or against personalty.

Stewart vs. *Isidor*, 1 N. B. R., 485, 489.
In re Bloss, 4 N. B. R., 147.
In re Jaycox & Green, 8 N. B. R., 241, 275.
Hoadley vs. *Caywood*, 40 Ind., 239, 243.

In *McHenry* vs. *La Societa' Francaise D'Epargnes*, 95 U. S., 58, Mr. Chief Justice Waite further said: "He," the assignee, "need not trouble himself about encumbered property unless something may be realized on it on their" [unsecured creditors'] "account, or unless it becomes ne-

cessary to do so in order to ascertain the rights of the secured creditors in the general estate. If he does, and it becomes necessary to adjust the liens before his sale he may, under the decision in *Claflin* vs. *Houseman*, institute proceedings for that purpose in the courts of the United States or of the State, as he chooses. *If he does not, the secured creditor who wishes to make his security available must act.*" Here in a suit for foreclosure of a mortgage where the mortgagee had proved his debt in the bankruptcy proceedings leave of the Bankruptcy Court was obtained to maintain the suit.

Leave of Court might have been granted stock-board creditors on their application for the withdrawal of their proofs and the sale of the seats.

Ex Parte Harwood, Crabbe, 496.

Phillips vs. *Bowden*, 52 Ga., 544.

The remaining question in the case is, what credits are to be allowed the bankrupt against these seats or their values which it has been shown belong to the assignees?

It is submitted:

V.

THE BANKRUPT IN NOT ENTITLED TO BE REIMBURSED THE MONEYS PAID BY HIM TO HIS CREDITORS OF THE STOCK EXCHANGE.

The dues and assessments actually paid by Yerkes, it is conceded, should be returned to him, for they were paid under an understanding with the assignee that he should be reimbursed for such outlays.

But further than this he has no claim upon the assignees.

The part payment by Yerkes cannot be regarded as effecting a *pro rata* assignment.

Loeb vs. *Fleming*, 15 Ill. App., 503.

Bayard vs. *McGaw*, 1 *Ibid.*, 134.

In paying his creditors he was a mere volunteer. He

assumed, without just reason, that the seats were his own and took the risk of payments to his Stock Exchange creditors in order to secure them to himself. In order to allow these claims in Yerkes' hands it would have to be established that the debts are still alive, and that he has the right of subrogation to the liens upon the seats held by the Stock Exchange creditors before payment. Neither of these positions is sustainable.

In the first place, the Stock Exchange creditors lost their lien upon the seats by proving their claim as unsecured creditors before the Register and taking their dividends to the extent of 28 per cent. out of the general assigned estate.

A judgment or other lien creditor by proving his debt and thereby electing to become a party to the proceedings in bankruptcy by that act surrendering his judgment and is entitled to nothing but a dividend as other creditors.

Haxton vs. *Corse*, 4 Ed. Ch., 585.

White vs. *Crawford*, 3 McCrary, 412.

So that even if Yerkes' payment of those debts was in law an acquisition of them by purchase, his use of them cannot be as a lien claimant with a right of reimbursement ahead of the other creditors.

But as matter of fact, Yerkes merely paid his debts to the Stock Exchange creditors and did not purchase them, and the debts were extinguished for all purposes, and Yerkes cannot now assert them by way of subrogation to the former rights of the creditors paid.

The contrary view would make Yerkes a creditor against his own estate. Says Pothier:

"It is evident that by the concurrence of these opposite characters of debtor and creditor in the same person, the two characters are mutually destroyed, for it is impossible to be both at once. A person can neither be his own debtor nor his own creditor. From hence indirectly results the extinction of the debt, when there is no other debtor, and the extinction having extinguished the character of debtor in the only person in whom it resided, there can be no debt."

1 *Pothier*, Obl., 607.

The case of *In re Burton*, 29 Fed. Rep. 637, is instructive in this connection. A bankrupt after discharge paid off or purchased certain liens against his estate, and attempted to assert them against his assignees. The Court reviewed the authorities, and denied the claim, relying upon the principle that the bankrupt, though discharged, was still a debtor and payment of his debts voluntarily made was in that capacity and extinguished the debts for all purposes. The court said:

"If, then, the debt is not destroyed by the discharge in bankruptcy, but the obligation to pay continued in existence, and which can only be defeated by pleading the discharge and bar of the remedy, it seems clear that the character of debtor continues and attaches to the bankrupt, so as to bring him within the principle that where the character of debtor and the character of creditor of the same debt become united in the same person, the debt is extinguished. * * * But, further, the debt not being destroyed by discharge in bankruptcy, but the obligation to pay it continuing, when the bankrupt recognizing this obligation, voluntarily pays these debts, or compromises them with the holders, he declines to avail himself of the advantages of his discharge, and waives it as a bar to recovery against him — he does what duty demands and what the law (failing to plead his discharge) would compel him to do. It is clearly as complete and full satisfaction of the debts as can be made."

It is obvious that if the title to these seats or to their proceeds, if sold, is in the assignees, any claim by Yerkes upon them by way of preference must rest solely upon the preservation of the debt, which is not countenanced by any principle or authority.

It will be noted that Yerkes in his answer to the petition in the bankruptcy proceedings for a sale of these seats claims them "as personal privileges and not property which could be sold by the assignees" (Rec. p. 44; fol. 80), which claim is not made in the answers to the bills; and it is urged that his resistance to such sale of these seats in that proceeding renders him liable for the market value [which would be more advantageous to the general creditors], particularly in view of the expense, trouble and delay to which the assignees in maintaining the rights of the creditors have been put by him.

In the case of the Philadelphia seat, the Record shows that Yerkes, on February 13, 1885, transferred the right he had in it to Charles E. Yerkes, who was subsequently admitted to the Exchange and became a party to that suit. (Rec. II, pp. 10, 12, 13, fols. 18, 23, 26.)

This transfer does not of course affect the rights of the principal parties litigant, for as it was after the filing of the petition in the Bankruptcy Court April 28, 1884, initiating these proceedings, the transferee took with notice and he is subject to the disabilities of a purchaser *lis pendens*.

The appellants respectfully submit:

That the Specifications of Error have been established,

That the property in the Stock Exchange seats belongs to them, and that the appellee Yerkes, having wrongful possession of these seats, ought to pay the appellants their highest market value, less such amounts as have been paid the Exchanges by Yerkes for dues, assessments and charges under agreement with the appellants.

Or that the appellants should be paid their value out of the proceeds of the sale of the seats, in case it be held that Yerkes is not properly chargeable with their highest market value during his possession.

That if he be adjudged to be entitled to the possession of these seats as against the appellants, it can only be upon repaying to the appellants the existing liens upon the seats, which the appellants possessed by subrogation to the amount of the money received by the Stock Exchange creditors from the bankrupt's estate.

And that the decrees entered by the Court below based upon a denial of these positions were erroneous and should be reversed.

WAYNE MAC VEAGH,

For Appellants.

AGREEMENT.

SPARHAWK *et al.*,
vs.
YERKES, *et al.*
} S. C. U. S. October Term, 1891. No. 56.

SPARHAWK, *et al.*,
vs.
ACKLEY, *et al.*
} S. C. U. S. October Term, 1891. No. 57.

The following facts are agreed upon to be considered of record in the above entitled causes:

That Charles T. Yerkes, Junior, made a voluntary assignment for the benefit of creditors to Joseph M. Pile, Esq., October 24, 1871.

That the petition in bankruptcy was filed November 10, 1871.

That on February 8, 1872, the Court of Bankruptcy divested the said Joseph M. Pile of the estate vesting in him by the said voluntary assignment, and directed the assignment and transfer by the said Joseph M. Pile of the estate of the bankrupt unadministered by him.

That subsequently the said assignment was executed and delivered to the assignees of the bankrupt.

That the total amount of debts proven by creditors before the Register in Bankruptcy was eight hundred and twenty nine thousand one hundred and ninety-eight dollars and forty-five cents, ($829,198.45), and that the number of creditors was ninety-nine.

That the dividends declared by the assignees up to the time of filing the Bills in Equity in this litigation were as follows:

July 19, 1872. Ten per cent.
May 12, 1873. Nine per cent.
April 5, 1878. Eight per cent.
January 30, 1880. One per cent.

(Signed) WAYNE MAC VEAGH,
H. W. H.
Attorney for Appellants.

(Signed) FRANK P. PRICHARD,
Attorney for Appellees.

AGREEMENT.

SPARHAWK *et al.*, *vs.* YERKES, *et al.* — S. C. U. S. October Term, 1891. No. 56.

SPARHAWK, *et al.*, *vs.* ACKLEY, *et al.* — S. C. U. S. October Term, 1891. No. 57.

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Attorney for Appellees.

Office Supreme Court, U. S.
FILED.
OCT 20 1891
JAMES H. McKENNEY
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Nos. 56 and 57. October Term, 1891.

IN THE

Supreme Court of the United States.

JOHN SPARHAWK *ET AL.*, ASSIGNEES,
Appellants,

vs.

CHARLES T. YERKES, JR., *ET AL.*,
Appellees.

APPEALS FROM THE CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

APPELLEES' BRIEF.

INDEX.

PAGE
Statement of the Case 1
Brief of Argument 3

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J. RODMAN PAUL,
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For the Philadelphia and New York Stock Exchanges, Appellees.

In the Supreme Court of the United States.

John Sparhawk et al., *Assignees*,
vs.
Charles T. Yerkes et al.

October Term, 1891.
Nos. 56 and 57.

STATEMENT OF THE CASE.

In December, 1871, Charles T. Yerkes, Jr., was adjudicated a bankrupt. At that time he was a member of the Philadelphia Stock Exchange and the New York Stock Exchange. Both of these institutions were unincorporated associations, a membership in which partook largely of the nature of a personal privilege, although from the fact that a membership could be sold (subject to the election of the transferee) it had a pecuniary value. The rules of both associations provided that in case of insolvency or bankruptcy the member was suspended, and that unless he settled within a year with his creditors who were members of the association, his seat should be sold, and the proceeds divided *pro rata* among such members. A suspended member might be reinstated if the governing committee reported favorably upon his application. (Record, pages 36, 37, folios 67–70.)

At the time of the bankruptcy the membership in the Philadelphia Stock Exchange was not worth over $2000, and that in the New York Stock Exchange was worth about $4000. (Record, page 46, folio 85.) The bankrupt was indebted to members of the Philadelphia Stock Exchange in the sum of $21,842.11, and to members of the New York Stock Exchange in the sum of $8522.99. (Record, page 46, folio 84.) These memberships were mentioned in the schedules, but stated to be of no specified value (Record, page 45, folio 83), and in the

inventory and appraisement of the estate subsequently made they were appraised as of no value. (Record, page 54, folio 102.) The assignees sent to both associations the ordinary notice of their appointment as assignees (Record, page 27, folio 56), but, knowing that the estate could not possibly pay over thirty-five per cent. dividend, they did not suppose that anything could be realized from the memberships. (Record, page 29, folio 58, 59.) At some time, the date of which was not fixed, but which was believed by the assignees to be within two years after the bankruptcy, which occurred in December, 1871 (Record, page 32, folio 63), the bankrupt brought to the assignees a notice of an assessment, or charge, due to one of the associations on account of the membership, and asked the assignees what they were going to do about its payment. They answered that, as the claim had been made upon him, they thought he was the proper party to pay it. (Record, page 31, folio 61.) On October 3d, 1873, the bankrupt was discharged. In 1876 the case of Hyde *vs.* Woods, 94 U. S., 523, was decided by this court, confirming an opinion already given to the assignees by their counsel (Record, page 28, folio 58), and sustaining the validity of rules of stock exchanges providing for the application of proceeds of sales of memberships to the debts due by members. The assignees considered that case as ruling this, and did not propose to take any further steps (Record, page 29, folio 59; page 32, folio 62), and in a conversation with the bankrupt so told him. (Record, page 25, folio 53, and page 55, folio 105.) The bankrupt supposed from these conversations that the assignees never expected to make any claim. (Record, page 24, folio 53.) During the five years from 1871 to 1876, the date of the decision in Hyde *vs.* Woods, the assignees took no steps either to compel a conveyance or sale of the seats, or to assume any liability or responsibility for the assessments and charges, and for the period of eight years after that decision they not only took no such steps, but did not intimate to the bankrupt or the associations that they had any claim. (Record, page 30, folio 59, and page 33, folio 63.) In the meantime the bankrupt, from the time of his bankruptcy, had been unremitting in his efforts to be readmitted to mem-

bership. By personal solicitations he persuaded the members of the associations to withhold for his personal benefit any demand for a sale of the memberships. He paid from year to year, with the knowledge of the assignees, the periodical assessments, and he paid, also with their knowledge, either in money out of his own earnings or in services, the debts due the members. (Record, pages 23, 24, folio 52; page 20, folio 48; page 56, folio 108; page 31, folio 61.) In this he was aided by the reduction of those debts by the dividends, amounting to twenty-eight per cent., paid by the estate, but even after the receipt of these dividends the balance of the debts due in each association was largely in excess of the value of the membership at the time of bankruptcy. Finally, on June 18th, 1883, nearly ten years after his discharge in bankruptcy, the bankrupt was re-elected to membership in the Philadelphia Stock Exchange, and on December 27th, 1883, to membership in the New York Stock Exchange, thus realizing the fruits of his efforts and expenditures during these ten years, the value of the memberships having materially increased some years after the bankrupt's discharge. On April 28th, 1884, thirteen years after their appointment, the assignees presented a petition for a sale of the memberships, which had thus been preserved and rendered valuable by the exertions and expenditures of the bankrupt. This petition was refused, and the refusal was affirmed on appeal. The assignees then, on November 14th, 1885, filed the present bills in equity to accomplish the same purpose. The Master reported a decree dismissing the bills, and his report was confirmed by the court.

BRIEF OF ARGUMENT.

Before discussing the principles of law governing this case it may be well to call attention to certain features of the case which the appellants seem to have overlooked, and which distinguish it from all the cases cited in their brief, viz:—

1. The memberships in the stock exchanges were peculiar property. They did not represent actual shares in tangible

property like the capital of a corporation. They were not subject to execution nor to sale except under the rules of the associations. They were strictly personal privileges, having, it is true, a pecuniary value, but a value which could only be realized by the assignees by a proceeding to compel the bankrupt to exercise his privilege of assignment. This is the course which was followed in--

In re Ketchum, 1 Federal Reporter, 840;
In re Warder, 10 Federal Reporter, 275.

2. The memberships were incumbered and chargeable property. They were subject to the rules of the associations that no transfer could be made until all debts due members were settled, and that in case of sale the proceeds should be paid to creditor members. They could only be preserved by the periodical payment of certain charges and assessments. To take possession and preserve then required some considerable expenditure by the assignee.

3. At the time of bankruptcy and at the time of the bankrupt's discharge the memberships were of no value to the estate, and were so appraised. The bankrupt's estate could not possibly pay a dividend equal to the excess of his debts in the exchanges over the value of the memberships. If the assignees demanded a sale or allowed the property to be sold they would realize no portion of the proceeds. If, on the other hand, they expended moneys to pay assessments, &c., and thus preserve the memberships, they had no reasonable prospect of reimbursement.

4. For thirteen years after the bankruptcy the assignees took no steps to obtain possession of this property. They did not ask for an assignment by the bankrupt. They did not ask for a sale. They declined to pay the periodical charges. Beyond the formal notification of their appointment to both exchanges and an inquiry of one of the exchanges as to the form of sale they did nothing.

5. During this thirteen years the memberships were preserved by the acts and expenditures of the bankrupt. He

made the periodical payments. He induced the members out of personal consideration for him and for his personal benefit to withhold a demand for a sale. He finally paid in money and services to the creditor members of the exchanges more than the entire gross value of the memberships at the date of bankruptcy. He did this with the knowledge of the assignees and under the belief that the assignees never expected to make any claim. Had it not been for his exertions and expenditures made under this belief the memberships would have been swept away and would not have realized anything.

In view of these facts the principle of law which it is submitted governs this case may be thus stated:—

These memberships being at the time of bankruptcy of no value to the estate, being burdened with a liability for members' debts and for periodical assessments or dues, and requiring for their possession and preservation some active proceedings and some expenditure of money on the part of the assignees, belonged to that class of property which the assignees were not bound to accept and which in the absence of such acceptance remained in the bankrupt, and in any event the assignees have no equity, after a delay of thirteen years, to ask the aid of a chancellor to wrest from the bankrupt property which in the meantime has been preserved only by the bankrupt's exertions and expenditures.

It has always been a principle of the bankrupt law that property which from its nature or condition may be a burden rather than a benefit to the estate does not pass to the assignee without a distinct acceptance by him, and that in the absence of such acceptance it remains with the bankrupt.

This principle has been more than once recognized and enforced in this court. In

Glenny *vs.* Langdon, 98 U. S. Rep., 20–30,

the court say:—

"Strong support to the conclusion is also derived from the fact that cases arise in bankruptcy proceedings where the assignee is not bound to take possession of some particular asset which passed to him by the

instrument of assignment. Examples of the kind, such as certain leasehold estates which would burden instead of benefiting the fund to be distributed, are given by Judge Ware in the case of Smith *vs.* Gordon (6 Law Rep., 317), to which reference is made as showing the principle of the rule.

Leasehold estates pass to the assignee under the English bankrupt laws, but the assignee, in certain cases, is not bound to take the lease of the estate where the rent is greater than the value of the lease, as the effect would be to burden the estate of the bankrupt and to diminish the fund to be distributed among the creditors. Copeland *vs.* Stephens, 1 Barn. & Ald., 604; Amory *vs.* Lawrence, 3 Cliff., 535; Fowler *vs.* Down, 1 Bos. & Pull., 157; Fox *vs.* Webb, 7 T. R., 397; Wilkins *vs.* Fry, 1 Meriv., 244.

It has long been a recognized principle of the bankrupt law, says Robson, that the assignees of a bankrupt are not, in certain cases, bound to take property of an onerous or unprofitable character, which would burden instead of benefiting the estate; and there are numerous decisions, English and American, which support the proposition. Nor are the creditors without remedy in such a case, even if the assignees should erroneously or unwisely fail to take such possession, as the creditors may, by petition, apply to the court of original jurisdiction to compel him to carry out their wishes."

Again, in

American File Company *vs.* Garrett, 110 U. S., 288–295, this court, in deciding that without the acceptance by the assignees in bankruptcy of corporate stock belonging to a bankrupt neither they nor the estate could be held liable as stockholders, said:—

"It has long been a recognized principle of the bankrupt laws that the assignees were not bound to accept property of an onerous or unprofitable character. South Staffordshire Railway Company *vs.* Burnside, 5 Ex., 129; Furdonjee's Case, 3 Ch. Div., 268; *Ex parte* Davis, 3 Ch. Div., 463; Streeter *vs.* Sumner, 31 N. H., 542; Amory *vs.* Lawrence, 3 Cliff., 523; Rugely & Harrison *vs.* Robinson, 19 Ala., 404.

As the assignees of Chapman never accepted the stock, and never consented to become stockholders in the American File Company, it follows that neither they nor the assets of Chapman in their hands are subject to the individual liability of stockholders for the debt of the corporation."

The cases cited in the foregoing opinions sustain to the full extent the principle as there stated.

In the case of

Smith *vs.* Gordon, 6 Law Rep., 313,

there was at the time of the bankruptcy a suit pending by certain creditors to obtain payment of their claims out of certain property conveyed in trust by the bankrupt. The assignee took no steps in the matter until after the creditors had obtained a decree declaring that the property belonged to the bankrupt. He then filed a bill in equity to enjoin the creditors from enforcing the decree, on the ground that the property, by the bankruptcy, vested in him as assignee. The court held that under the law of Maine the filing of the creditors' bill gave no lien on, or preference out of, the property, and that the right of the bankrupt passed to the assignee in bankruptcy, but refused the relief asked for by the latter on the ground that as he had not promptly accepted the property by intervening in the suit he could not now claim it.

Judge WARE, in delivering the opinion, said:—

"By the bankrupt act all the property and rights of property of the bankrupt, by force of the decree of bankruptcy, pass to the assignee by operation of law and become vested in him as soon as he is appointed. But though the legal title passes he is not bound to take possession of all. It is perfectly well settled with respect to lea-ehold estates under the English bankrupt laws that the assignee is not bound to take the lease and charge the estate with the payment of rent. (Copeland *vs.* Stephens, 1 Barn. & Ald., 573.) The rent may be greater than the value of the lease, and thus the estate may be burdened instead of being benefited by taking the lease, and in such case the *damnosa hereditas* may be abandoned by the assignee. I have had occasion to consider this question in another ca-se, and I came to the conclusion that this doctrine equally holds under our bankrupt law (*ex parte* Whitman, December, 1842); and I take the principle to be a general one, that the assignee is not at least ordinarily bound to take into his possession property which will be a burden instead of a benefit to the estate. * * * If the assignee may elect to take or not to take any part of the bankrupt's property, some period of time must be limited within which the election is to be made. If he elects not to take, the property remains in the bankrupt, for his possession gives him a good title against every person except the assignee, and the assignee cannot be allowed to hold the title in this kind of abeyance for an indefinite or unlimited period. If, with the knowledge of the bankrupt's title, or with the means of knowledge, he stands by without asserting his claim for a lapse of time, and allows third persons in the prosecution of their legal rights to acquire an interest in the property, it appears to me that he then comes too late to assert his claim; that the time for his election is then passed. In this case the property or right of property had been in litigation for more

than two years when Lowell was declared a bankrupt. Large expenses had been incurred in the prosecution of the suit, and the issue was still undecided and doubtful. Admitting that the assignee had then a right to assert and maintain his claim, he must be allowed a reasonable time to investigate the title and determine whether it would be for the interest of the creditors to assert his claim or not. But it would be highly inequitable to allow either the creditors or the assignee to stand by and await the issue of a doubtful suit, and when it is decided in favor of the plaintiff to come forward and wrest from him the fruits of an expensive and hazardous litigation."

In the case of

Amory *vs.* Lawrence, 3 Clifford, 523–537,

the language of the court was as follows:—

"Assignees may refuse to take possession of onerous properties or such as will be a burden instead of a profit, and the clear presumption from the bill as admitted by the demurrer is that the claim against the trustee was regarded in that light by the assignee. Robson says it has long been a recognized principle of the bankrupt law that the assignees of a bankrupt are not bound to take property of an onerous or unprofitable character, or property which will be a burden instead of a benefit. They are on that subject regarded as being in a very different position from that of the executors of a deceased testator, as the former take the property by operation of law, while the latter claim title through their testator, and are bound to perform his obligations to the extent of his assets. Robson, Bankruptcy, 322. Where the assignee elects not to take the right of the bankrupt and charge the estate with the burden of an uncertain litigation, the right, whatever it is, survives in the bankrupt, and some of the authorities hold that it may be pursued by any creditor not a party to the proceedings in bankruptcy. Smith *vs.* Gordon, 6 Law Rep., 317. Persons acting as assignees in such a case are required to elect within a reasonable time, and the rule is that if they refuse to elect when required to do so, it is deemed an election to reject the estate. Lawrence *vs.* Knowles, 5 Bing. N. C., 150; Carter *vs.* Warne, 4 C. & P., 336; Graham *vs.* Van Dieman Land Co., 11 Excli., 101; *Ex parte* Blandy, 1 Dea., 286; Tuck *vs.* Fyson, 6 Bing., 94. Doubtless the complainant, in such a case, must allege or prove enough to show that the assignee is estopped to set up any right in opposition to his claim, and the court is of the opinion that enough is alleged in this case to satisfy that requirement."

In the case of

Streeter *vs.* Sumner, 31 N. H., 542,

a contract was made by a bankrupt before his bankruptcy to move upon a farm of the defendants with his family, and to live there and board the defendants' lumbermen and keep his

teams for five or six years, the defendants agreeing to pay him extra prices, and to make him whole for any improvements he might make upon the farm. This contract had been in force two years at the time of the bankruptcy. The assignee did not interfere and the bankrupt continued to complete his part of the contract. *Held*, that the contract did not pass to the assignee and the bankrupt might recover upon it. The court saying :—

"As the general rule, contracts to be performed to a party and his rights of action are deemed property, and such contracts and rights of action pass by the operation of the bankrupt law to the assignee for the benefit of creditors. But to the general rule we conceive there must be many exceptions, some from the nature of the contracts and some from the nature of the interests involved, while others cannot be deemed property because they subject a party to what may more properly be regarded as a burden than a privilege, where the assignee from the conditions of the contract can derive no benefit for the creditors and may subject the estate to loss if he assumes the contract. * * * Of the class spoken of, that which cannot be regarded as property because it is, from the character of the stipulations and the relations of the values concerned, a burden rather than a benefit, may be named the case of leases upon unfavorable terms. * * * In England the assignee is allowed a reasonable time to ascertain the value, and is allowed an election in behalf of creditors to accept the assignment or to refuse it. An actual transfer is required by law there, which cannot be effectual without an acceptance, real or supposed, by the assignee. Upon the same principle the assignee must be understood to have an election as to contracts of every kind, to repudiate and reject the assignments if the contracts, by their continuance, seem likely to subject the available estate to future losses. By the late bankrupt law no assignment in fact is required; everthing which can be properly deemed property passed to the assignee by force of the law, but we think this circumstance makes no difference. The English assignee rejects agreements likely to prove onerous in future, because they are not property within the intention of the law, but merely incumbrances upon the available assets of the bankrupt. Here the contract should be held not to pass to the assignee, not to be divested from the bankrupt because it is not property available for the payment of debts. In some cases the burdensome character of contracts, as leases, for example, may be at once obvious. In others it may be a matter of doubt and uncertainty, requiring careful inquiry and consideration. The statute operates upon all property *ipso facto* upon the decree of the bankruptcy and at once, but for the assignee to determine the question whether the contract is property or only a charge upon the other estate, may and often must require time. But whenever it appears that a contract must prove a burden in

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future if the assignee assumes the obligations of the bankrupt, it must be regarded as not being property within the meaning of the bankrupt law. * * *

Where the right of the bankrupt himself is involved, either party may be compelled to rely on such evidence as the case admits of, to show that the contract was worthless to the assignee and to the creditors. Of such evidence none would usually be more satisfactory and convincing than the fact that the assignee, being fully aware of the contract, has closed up the settlement of the estate without in any way intermeddling with the contract. If the evidence also showed that the contract was one from which the creditors could probably have derived no benefit, and by which they might be exposed to loss, the conclusion would be much strengthened."

In the case of

Nash *vs.* Simpson, 78 Maine, 142,

the court, in speaking of the right of an assignee in bankruptcy, says:—

"An assignee, unlike an executor of a deceased testator, is not bound to take possession of all property that thus vests in him. It may be onerous property, depending upon uncertain litigation. He may elect to take it or not to take it; and if he elects not to take it, then it survives to the bankrupt unless he has disposed of it. Moreover, he must elect within a reasonable time; otherwise it is deemed an election to reject it."

In the case of

Ex parte Houghton, 1 Lowell, 554–559,

Lowell, J., in passing upon the question of the liability of a bankrupt's estate for rent due under a lease, says:—

"The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have a reasonable time to elect whether they will assume a lease which they find in his possession, and if they do not take it the bankrupt retains the term on precisely the same footing as before, with the right to occupy and the obligation to pay rent; if they do not take it he is released, as in all other cases of valid assignment, from all liability excepting on his covenants, and from these he is not discharged in any event. Henley on Bankruptcy (third edition), 237; Auriol *vs.* Mills, 4 T. R., 94; Copeland *vs.* Stevens, 1 B. & A., 593; Tuck *vs.* Fyson, 6 Bing., 321; Robson on Bankruptcy, 328. This rule was long since modified in England by statutes 49 Geo. III., chapter 121, section 19, and 6 Geo. IV., chapter 16, section 75, by which the bankrupt was released from his covenants if either the assignee accepted the lease, or the bankrupt himself surrendered it to his lessor within fourteen days after notice that the assignee had declined. This

remained the law by re-enactment in the several revisions of the bankrupt acts down to the latest in 1869, 32 and 33 Vict., chapter 71, section 23, which authorizes an assignee to disclaim any onerous property or contract and deprives the bankrupt of all interest therein whether the assignee disclaims or not, and gives any person "injured by the operation of this section" the right to prove the amount of his injury as a debt under the bankruptcy. This is the first legislative recognition that I have found of any debt of the character now sought to be proved, and the petitioners have failed to discover any judicial determination of a similar right. The American authorities follow the line of reasoning and decision of the earlier English cases, and hold that a lessor has no provable debt, contingent or otherwise, for the reason that rent accrues from time to time, and is not and cannot be due *in solido* beforehand, since it depends on occupation from time to time.

Leaving out of view, for the moment, the peculiar clause of this lease relating to bankruptcy, which the petitioners say they have never acted on, and overlooking the fact of their re-entry, how did the bankruptcy affect this lease? The assignees did not assume the lease, and consequently the original parties simply stand as landlord and tenant."

In the case of

In re Learmouth, 14 Week. Rep., 628,

a bankrupt had prior to the bankruptcy mortgaged certain policies of life insurance. The assignees declined to pay the premiums and disclaimed all interest in the policies. The bankrupt continued to pay the premiums, obtained his discharge and afterwards died. The mortgagee collected the insurance money and the assignees thereupon claimed the balance above the mortgage debt. The Master of the Rolls (Lord Romilly) held that this balance belonged not to the assignees but to the representatives of the bankrupt.

In the case of

Taylor *vs.* Irwin, 20 Fed. Rep., 615–620,

the court say:—

"It is for the assignee to determine whether or not, in a given case, he will assert his right to property. He may elect not to charge the estate with the burden of looking after property. This election he must exercise within a reasonable time. A failure to do so may, as against third parties, be construed as an election not to claim the property." (Citing Amory *vs.* Lawrence, Smith *vs.* Gordon, &c.)

The cases also establish the fact that in order to constitute an acceptance of the property by the assignee there must be

such an act as amounts to the taking of possession by him, making the estate liable to the burdens as well as entitled to the benefits of the property. Thus in Turner *vs.* Richardson, 7 East., 335, the assignees advertised a lease for sale, but without stating that they were in possession, and, in point of fact, they never did take possession of the property. It was held that this did not constitute an acceptance of the lease. And in Taylor *vs.* Irwin, *supra*, the assignee put up for sale whatever interest he might have in the property and sold it for ten dollars. It was held that this did not prevent him and his vendee from being estopped from an assertion of title, by his previous failure to assume charge of the land for such length of time as would imply a disposition not to take possession at all.

In view of these authorities, it is clear that the memberships in the stock exchanges being of no value at the time of bankruptcy, and requiring for their possession and preservation some action and some expenditure on the part of the assignees, would not become part of the assets of the bankrupt estate without an acceptance by the assignees, and that the mere sending of notice of their appointment to the stock exchanges did not constitute such an acceptance.

It is quite clear also from the evidence that the assignees never intended to make any exertion or expend any money in order to preserve these seats or to obtain possession of them. They refused to pay the assessments and told the bankrupt that he was the proper party to pay them. (Folio 61, page 31.) They did not suppose they could realize anything from either of the memberships, and did not propose to take any steps with regard to them. (Folios 58, 59, page 29.) They did not, in point of fact, take any steps whatever to obtain possession of the property, or to preserve it, from 1871 to 1884, a period of thirteen years, and for a period of five years, prior to the filing of their first petition in this matter, they did not even mention the matter to the bankrupt, or communicate with him or the stock exchanges with reference to it. (Record, folio 60, page 30.) They allowed the bankrupt to be discharged in 1873 without making any application to the court to have him execute a conveyance of these mem-

berships, and without even requesting him to do so. They knew that he was subsequently making efforts, by paying members of the exchanges and otherwise, to obtain readmission to membership. (Record, folio 66, page 35.)

As a presumption of law, the assignees did not accept these memberships as part of the assets of the estate, since they were utterly worthless to the estate, and would have been burdensome if accepted, and there was no reason to suppose that anything could ever be realized from them. It was their duty, as assignees under such circumstances, not to accept the property, and the presumption of law is that they did their duty. This presumption of law is rendered conclusive by their actions. For thirteen years they took no action whatever with regard to these seats, excepting to send a formal notice of their appointment and inquire as to the method of sale. So far as acts and conduct can indicate any intention, it is clear that the assignees did not intend to take possession of this asset, or to burden the estate with it.

On this ground alone the appellees might well rest their case, but there is a much stronger ground. The character of the memberships was such that they could only be made an asset of the estate and taken possession of by the assignees by means of proceedings to compel the bankrupt to exercise his personal right and privilege for their benefit, and to compel the stock exchanges to aid the assignees in disposing of the memberships to some third person. Both the bankrupt and the stock exchanges had a right to expect that any proceedings for this purpose would be taken promptly.

If the assignees did not act the bankrupt remained a member of the exchanges, he was liable for the periodical payments, he was entitled to the benefit of the insurance or gratuity funds, and he alone was the one to whom the associations would look for payments, and to whom they would send notices. No action having been taken by the assignees, the bankrupt, with their knowledge, made the periodical payments, preserved the seats from sale, and by his personal exertions and large payments of money induced the individual

members to withhold, for his personal benefit and accommodation, any demand for a sale of the memberships. Had a sale taken place nothing would have been realized for the bankrupt estate. The sale was only prevented by the bankrupt's exertions and expenditures. He was discharged as a bankrupt in 1873, at the end of two years from the proceedings. The bulk of his estate was collected and distributed within those years. That he tells the truth when he says (Record, folio 53, page 24) that he supposed that the assignees had conceded that they had no rights, and that they never expected to make a claim, is shown by the fact that for years he expended both his exertions and money in trying to preserve the seats, and to be reinstated as an active member. It is absurd to suppose that he would have done this had he believed that the result would have inured to the benefit of his assignees, and that he would be reinstated as an active member only to have the memberships immediately sold by his assignees. And there is no reason to suppose that the stock exchanges would have preserved the memberships and reinstated the bankrupt had they supposed that the result would have been simply to bring them into embarrassing relations with the assignees, whose rights could only be enforced by proceedings in equity, and whose claim would be difficult of accurate definition and of practical realization.

The case therefore presents this aspect: The assignees, having in 1871 no rights of any value in the memberships, studiously avoid assuming any liability therefor or making any payments thereon. They carefully refrain from assuming any relations towards the exchanges which would give the exchanges any rights as to them. They stand by for thirteen years and watch the bankrupt after his discharge, by the expenditure of labor and money, preserve the memberships; and they allow the associations and the bankrupt finally to assume new relations by the restoration of the bankrupt to active membership, and his recognition by the exchanges as entitled to all the rights and privileges of an active member. They then file a bill in equity, and ask a chancellor to take away from the bankrupt property which has

become valuable solely by his expenditures and exertions, and to compel the stock exchanges to admit them as owners of the privileges of their associations in place of the bankrupt, with whom the exchanges had dealt. A more inequitable claim can scarcely be imagined. We may well apply to it the language of Mr. Justice Harlan, in delivering the opinion of this court, in

Heywood *vs.* National Bank, 96 U. S., 611–617.

"Courts of equity often treat a lapse of time, less than that prescribed by the statute of limitations, as a presumptive bar, on the ground "of "discouraging stale claims, or gross *laches*, or unexplained acquiescence "in the assertion of an adverse right." 2 Story, Eq. Jur., section 1520. In Smith *vs.* Clay (Amb., 645), Lord Camden said: "A court of equity, "which is never active in relief against conscience or public convenience, "has always refused its aid to stale demands, when the party has slept "upon his rights, and acquiesced for a great length of time. Nothing can "call forth this court into activity but conscience, good faith, and reason-"able diligence. When these are wanting the court is passive and does "nothing. *Laches* and neglect are always discountenanced." These doctrines have received the approval of this court in numerous cases. Twin Lick Oil Co. *vs.* Marbury, 91 U. S., 587; Badger *vs.* Badger, 2 Wall., 87; Marsh *vs.* Whitmore, 21 *Id.*, 178; Harwood *vs.* Railroad Company, 17 *Id.*, 79. In the last-named case this court said that, without reference to any statute of limitation, equity has adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. The question of acquiescence or delay may often be controlled by the nature of the property which is the subject of litigation. "A delay which might have been of no consequence in "an ordinary case may be amply sufficient to bar relief when the prop-"erty is of speculative character, or is subject to contingencies, or where "the rights and liabilities of others have been in the meantime varied. "If the property is of a speculative or precarious nature, it is the duty of "a man complaining of fraud to put forward his complaint at the earliest "possible time. He cannot be allowed to remain passive, prepared to "affirm the transaction if the concern should prosper, or to repudiate it if "that should prove to his advantage." Kerr, Mistake and Fraud (Bump's), pages 302, 306; Twin Lick Oil Co. *vs.* Marbury, *supra*."

An examination of the appellants' brief will show that they rest their whole case upon a supposed trust in the bankrupt for the benefit of his estate. They contend that Yerkes was in fact agent or trustee for the assignees and for the body of his creditors, and that whatever money or labor he

expended in preserving the seats was expended as such agent or trustee, and therefore that no length of time would prevent the *cestui que trust* from enforcing the trust. This, it is submitted, is an entirely mistaken conception of the position of the bankrupt. Upon the adjudication in bankruptcy, the law gave to the assignees in bankruptcy the property of the bankrupt for the purpose of the payment of his then existing debts, but from that time he ceased to have any relation whatever to the assignee or to the estate, except that between the time of his adjudication and the time of his discharge he was subject to the summary orders of the court, and might have been compelled to do whatever was necessary to complete the possession of the estate by the assignees, and to give them information with regard to it. So far is he from having any trust relation to the estate, that he may even purchase the estate on credit from the assignees.

It is only necessary on this point to refer to the case of

Traer *vs.* Clews, 115 U. S., 528,

in which case this court, in sustaining a purchase by the bankrupt of a portion of his estate, said :—

"Whether Clews had been discharged at the date of the transfer to him is immaterial. After his adjudication as a bankrupt, and the surrender of his property to be administered in bankruptcy, he was just as much at liberty to purchase, if he had the means, any of the property so surrendered as any other person. The policy of the bankrupt act was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and to enable him to take a fresh start. His subsequent earnings were his own. A bankrupt might often desire, out of the proceeds of his exempted property, or out of his means earned since his bankruptcy, to purchase property which he had surrendered to the assignee. This he might do, and there is nothing in the letter or policy of the bankrupt act which forbids his doing so until after his discharge. For, having complied with the law, as it must be presumed he has, he is, after the lapse of six months, entitled as a matter of course to his discharge. His right to purchase property surrendered cannot, therefore, depend on his actual discharge, and, in this respect, he stands upon the same footing as any other person."

In the present case the bankrupt was discharged in 1873; as to his estate, from that time forth he was a stranger. Whatever property the assignees omitted to take possession of, be-

cause it was worthless, remained in him, and he was at entire liberty to render it valuable if he could. Neither his time nor his earnings belonged to his assignees, nor could any reason be suggested why he should be held to be a trustee for them as to such time and earnings. If the assignees had taken possession of the memberships they would have been trustees for the creditors, but because the memberships were worthless they did not take possession, and the property remained in the bankrupt, and, if he improved it, it was for his own benefit. As well might the appellants contend that if there was a continuing contract, as in Streeter *vs.* Sumner, *supra*, the assignees would be entitled to the subsequent earnings of the bankrupt under it, because, on the same principle as that for which they have contended, he would be a trustee for his creditors, and his labor would be theirs. Yet this proposition, that the bankrupt is a trustee for the assignees, even after his discharge, is all the appellants have to offer to excuse or avoid their thirteen years *laches*.

The appellants are in this dilemma—either they did not consider the memberships of any value, and did not intend to take possession of them as assets of the estate, in which case, under the authorities already cited, the ownership reverted to the bankrupt; or they intended to make the memberships assets of the estate, but neglected for thirteen years to make any attempt to realize possession, and allowed in the meantime other persons to acquire rights by expenditures and exertions upon the faith of their abandonment.

It has been contended by the appellants that even if the court below were right in holding that they cannot, after thirteen years delay, compel the bankrupt and the exchanges to give up rights acquired in the meanwhile, nevertheless they are entitled to some compensation out of the memberships on account of the dividends paid by the estate. The fallacy of this is obvious. At the time of the bankruptcy the probable amount of the estate was known to both parties, and a careful appraisement and inventory was made. It was apparent that the estate could not possibly pay over thirty-five per cent. in dividends. (Record, folio 58, page 29—it did, in

point of fact, pay twenty-eight per cent.) Even after payment of this thirty-five per cent. dividends, the amount of debts due the members of the exchanges was far in excess of the pecuniary value of the memberships. Both the bankrupt and the assignees knew that even with the aid of whatever dividends the estate would pay, the seats could only be preserved by the expenditure of more money than their entire value, and that any subsequent rise in value could only be realized by inducing the members not to insist upon a sale, and by paying or assuming the periodical charges. The assignees did not think it worth while to do this. The bankrupt, after giving them an opportunity to do it, did it himself. Whatever value was subsequently realized was the result of his action and expenditure, and not of any action or expenditure by the assignees. They have not shown that they aided in the slightest degree in producing the result the benefit of which they now seek to obtain, and there is no equity in their claim.

It may also be said that even if there were no objections to the plaintiffs' claim on the ground of *laches* and presumed abandonment of the memberships, they would only be entitled in a court of equity to receive that which belonged to them at the time of the bankruptcy, to wit, the then value of the seats, and not that which has accrued by the acts and expenditures of the bankrupt, to wit, the present value of the seats. This was the rule laid down in the case of *In re* McKinney, 15 Fed. Rep., 535, in which an assignee was given only the surrender value of a life insurance policy at the time of the bankruptcy, and this would seem to be an equitable rule. The value of these memberships at the time of the bankruptcy was nothing. They were appraised as worthless in the appraisement. This is what the assignees had, and this is all that they would have had if the bankrupt had pursued the same course which they pursued. All else is the result of his industry and his money.

It is not deemed necessary to discuss several collateral questions raised in the appellants' brief. It has been assumed in the foregoing argument that the memberships were property, although it may be doubted whether the case of Hyde *vs.*

Woods, 94 U. S., 523, went to any greater extent than to intimate that any surplus of the proceeds of a sale of the seats by the exchanges would be payable to the assignees as property of the bankrupt. The right to a sum of money payable in terms to the bankrupt would be different from the right to a personal privilege transferable only to a person elected a member. It is also a very doubtful question whether the rights of the members of the exchanges to sell the seats or to refuse to reinstate a member while his debts to other members remain unpaid is a lien on property, making the members secured creditors under the bankrupt act. It is submitted, however, that it is not necessary to decide these questions in view of the facts of this case. The real question in the case is, can the assignees neglect for thirteen years to take possession of a worthless asset while the bankrupt is by his exertions and expenditures endeavoring to preserve it, and then ask a court of equity to give them the value which the bankrupt has created or preserved.

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